Supreme Court
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NO. 87-989

In the Supreme Court of the United States

OCTOBER TERM, 1987

XANADU OF COCOA BEACH, INC.,
a Florida corporation,

Petitioner,

v.

MARVIN A. ZETLEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Rule 28.1 List of Parties

Xanadu of Cocoa Beach, Inc. is a wholly owned subsidiary of Towne Realty, Inc., which is a wholly owned subsidiary of Zilber, Ltd.

BEST AVA

QUESTIONS PRESENTED

1) Whether the Eleventh Circuit erred in addressing *sua aponte* choice of law issue that was stipulated to be the parties in the trial court and never raised on appeal.

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a Florida corporation,

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MARVIN A. ZETLEY,

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit. That decision concluded, *inter alia*, that Florida law applied to certain contracts at issue despite the fact that the parties had stipulated and the District Court had determined that Wisconsin law was to govern the construction of those agreements. The Eleventh Circuit made that determination even though no party challenged the application of Wisconsin law by the trial court.

RELEVANT OPINIONS AND ORDERS BELOW

A) The District Court's Findings of Fact and Conclusions of Law dated May 1, 1986. "Appendix A"

B) The Final Judgment dated May 2, 1986. "Apendix B"

C) The Eleventh Circuit's opinion dated July 24, 1987. "Appendix C"

D) The Eleventh Circuit's Order denying Appellee's Petition for Rehearing dated August 27, 1987. "Appendix E"

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit reversing the Final Judgment and remaining the case to the trial court was entered on July 24, 1987 "Appendix C". The Eleventh Circuit's denial of the Petitioner's Motion for Rehearing was entered August 27, 1987 "Appendix E". This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE AND FACTS

Petitioner, Xanadu of Cocoa Beach, Inc., brought this ejectment action against Respondent Marvin A. Zetley, seeking to compel him to vacate the premises of a penthouse located in Cocoa Beach, Florida. Zetley claimed extitlement to possession of the premises pursuant to a complex series of transactions and contracts. At the time of those transactions, all of the individuals involved were residents of Wisconsin. Additionally, all the relevant contracts were negotiated and executed in Wisconsin.

Initially, Zetley negotiated the trade of his interest in the Brown Deer Racquet Club in Milwaukee for three condominium units, including the penthouse at issue, which were located in Cocoa Beach. He entered into those negotiations through an intermediary, Alan Dolenshek, arranged the trade with Kenneth Alles (Third Party Defendant below) Alles' corporation, C & C Development, Inc. (also a Third Party Defendant below), acquired the Brown Deer Racquet Club and in return promised to convey the penthouse at issue and one other condominium unit to Zetley on or before April 1, 1983 or it would pay Zetley $500,000 in cash without interest on May 1, 1983. Another promissory note was executed, and personally guaranteed by Alles, by which C & C Development agreed to pay Zetley $150,000 on June 2, 1982 unless a third

condominium unit was transferred to Zetley by that time.

Subsequently, additional agreements were made by which Zetley relinquished his claim to one of the condominiums in return for a cash payment. After Zetley was unable to compel delelivery of title to one of the other condominium units, he sought assistance from Joseph Zilber, who was also a Milwaukee resident. Zilber was the principal of Towne Realty, which was the parent corporation of the Petitioner. Zilber arranged for the release of a condominium unit to Zetley in return for his assigning a promissory note to Alles and C & C Development. Zetley had already arranged to trade that condominium unit for other real estate.

A subsequent agreement between Zetley and C & C Development provided that C & C Development would deliver title to that unit by October 31, 1983, or additional cash payments would be made to Zetley. Subsequently, a general release was executed by Zetley, C & C Development and Alles which provided for, *inter alia*, settlement of all disputes and differences among the parties in consideration of which C & C Development and Alles would provide, *inter alia*, the conveyance of the penthouse at issue by March 1, 1984. If Alles and C & C Development failed to arrange the conveyance of the penthouse by that date, they would pay Zetley $350,000 with interest at 20% per annum commencing from October 1, 1983.

After the execution of that release, Zetley signed a letter agreement with Towne Realty, the parent corporation of the Petitioner. In return for Towne Realty delivering the deed to the condominium unit and releasing the first mortgage thereon, Zetley agreed to relinquish all rights and promissory notes which would be assigned to Towne Realty and in addition agreed to:

> Release Towne Realty, Inc., Xanadu of Cocoa Beach, Inc. and all of their officers, agents, employees and directors (C & C Development, Inc. and Kenneth E. Alles are not included within the terms of this release) from any and all claims or causes of actions, known or unknown, which [he] might otherwise have from the beginning of the time to the present.

Subsequent to the execution of that release, Zetley obtained the key to the penthouse at issue from an employee of Petitioner. He then proceeded to occupy and furnish the penthouse until this ejectment action was brought. However, Zetley did not receive title to the penthouse and subsequently contracted not the Petitioner, but Alles, to provide it to him. After he was unsuccessful in obtaining title from Alles, he sued C & C Development and Alles in Federal court in Wisconsin to obtain it. That action was dismissed for lack of jurisdiction and improper venue.

In this action, Petitioner sued Zetley for ejectment and for slander to title as to the penthouse based on his filing of a Lis Pendens against the property. Zetley counterclaimed for declaratory relief to establish and acquire title to the penthouse. Alternatively, he sought damages. Zetley also filed a Third Party Complaint against C & C Development and Alles seeking specific performance of the contract for delivery of title to the penthouse and, alternatively, for compensatory damages. The Third Party Defendants counter-claimed against Zetley for breach of contract, misrepresentation, and fraud.

This cause was set for a non-jury trial. Prior thereto, the parties filed a pretrial stipulation. In that stipulation, the parties agreed that the law of Wisconsin controlled the issues regarding the formation and interpretation of the contracts, and that the law of Florida governed their

performance and remedies. The cause proceeded to trial after which the trial court entered extensive findings of fact and conclusions of law. In its memorandum opinion, the trial court discussed the choice of law issue and concluded "Appendix A":

> The court, ...concurs with the parties in their pretrial stipulation, plaintiff's trial brief and in their respective post-trial briefs that the law of Wisconsin, the place of execution, governs claims regarding formation in terms of the subject contracts or the law of Florida, the location of the subject condominium and forum State, governs performance and remedies under the contracts.

The trial court then relied on Wisconsin law to determine, *inter alia*, that Zetley was not entitled to either possession or title to the penthouse. The court noted that under Wisconsin statutory and decisional law, authorization to act on behalf of another party in a real estate transaction could not be implied, but must be express, see *Nelson v. Albrechtson*, 287 N.W.2d 811 (Wis. 1980). Additionally, under Wisconsin law, to enforce a real estate transaction it must be proved that the grantor or grantors assented to the transaction, *Ibid.* Utilizing those two settled principles of Wisconsin law, the trial court concluded that since there were no contracts by which the Petitioner had agreed to convey the penthouse to Zetley, Zetley's claim to title, as against the Petitioner, was not enforceable. The court rejected Zetley's other arguments concerning his right to ownership or possession. The court upheld the Petitioner's claim for ejectment against Zetley and held him liable for $45,000, representing the rent due on the penthouse from December, 1983 through May, 1986.

The trial court did find in favor of Zetley with respect to the Third Party Defendants. As to the Third Party Defendants, the court concluded that they were liable for

$350,000 and 20% interest thereon commencing October 1, 1983 plus $75,000 "Appendix A". A final judgment incorporating those determinations was thereafter entered "Appendix D".

Zetley appealed to the Circuit Court of Appeals for the Eleventh Circuit. However, Zetley never raised as error the trial court's application of Wisconsin law. Nonetheless, the Eleventh Circuit determined,*sua sponte*, that Florida law applied to the numerous contracts between the parties. The Court cited *Conner v. Elliott*, 85 So. 164 (1920) and *Kyle v. Kyle*, 128 So.2d 427 (Fla. 2d DCA 1961) for the proposition that under Florida law the validity of a contract to convey an interest in real property is governed by the law of the State where the real estate is located. Even though that principle of law was limited to the *validity* of the contracts the Eleventh Circuit then stated that *all* aspects of the contracts at issue would be governed by Florida law. Based on that ruling, which eliminated numerous of the legal principles relied upon by the trial court to resolve the case, the Eleventh Circuit concluded, *inter alia*, that the Petitioner could be contractually bound to transfer title to the penthouse at issue to Zetley "Appendix C".

The Petitioner filed a Petition for Rehearing arguing, *inter alia*, that the court had erred in applying Florida law when neither of the parties had ever asserted that Florida law applied to those contracts and no issue had been raised on appeal regarding that choice of law issue "Appendix D". The Eleventh Circuit denied the Petition for Rehearing on August 27, 1987 "Appendix E".

REASONS FOR GRANTING THE WRIT

In this case, the Court of Appeals for the Eleventh Circuit determined, *sua sponte*, that Florida law should apply to all aspects of the contracts entered into by the parties in this case. It reached that conclusion despite the fact

that the parties had stipulated below that Wisconsin law should apply to the formation and interpretation of those contracts, the trial court had applied Wisconsin law as agreed by the parties, and neither of the parties had raised the choice of law issue before the appellate court. This Court has previously noted that there are limitations on the degree to which an appellate court is justified in resolving issues not presented to the trial court, see *Singleton v. Wulff*, 428 U.S. 106 (1976). While noting that, as a general rule, an issue would not be addressed for the first time on appeal, this Court also noted some exceptions and added in a footnote that those examples were not intended to be exclusive, 428 U.S. at 121 fn.8. It is respectfully submitted that the case *sub judice* would be a proper vehicle for clarifying this Court's discussion in *Singleton* regarding the limitations on a court of appeals with respect to such matters.

An additional justification for exercising jurisdiction is that it would appear that the decision of the Court of Appeals for the Eleventh Circuit in this case conflicts with decisions of other courts of appeals which have held that an appellate court will not address a conflict of law question when it was not properly raised below absent a miscarriage of justice, *Babb v. Schmidt*, 496 F.2d 957 (9th Cir. 1974); *Michael-Regarngeean Co., Inc. v. Lindell*, 527 F.2d 653 (9th Cir. 1975). The decision of the Court of Appeals for the Eleventh Circuit in this case conflicts with those cases because the court determined *sua sponte* that a conflict of law decision of the trial court was in error despite the fact that no party had ever challenged it and no miscarriage of justice was alleged nor found to exist.

COURT OF APPEALS FOR THE ELEVENTH CIRCUIT SHOULD NOT HAVE ADDRESSED THE CONFLICTS OF LAW ISSUE WHEN IT WAS NEVER RAISED IN THE TRIAL COURT NOR WAS IT RAISED ON APPEAL.

The parties in this case stipulated that Wisconsin law should apply to issues relating to the formation and interpretation of the contracts at issue. Based on that stipulation and its own analysis, the trial court applied Wisconsin law. No party challenged the application of Wisconsin law in the trial court nor was any issue relating to the choice of law issue raised on appeal. Nonetheless, the Court of Appeals for the Eleventh Circuit *sua sponte* addressed the issue and concluded that Florida law should apply to all aspects of the contracts reached between the parties. That decision altered the relevant legal principles upon which the case had been decided in the District Court, and resulted in the case being reversed. It is respectfully submitted that the Eleventh Circuit's action raises significant questions regarding the authority and discretion of an appellate court to address issues *sua sponte* that were never raised by the parties and justifies this Court exercising jurisdiction to properly clarify the rule of the appellate court in such a situation.

In *Singleton v. Wulff, supra*, 428 U.S. at 121 this Court stated:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt, see *Turner v. City of Memphis,*

> 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed2d 762 (1962), or where "injustice might otherwise result." *Hormel v. Helvering*, 312 U.S., at 557, 61 S.Ct. at 721. Suffice it to say that this is not such a case. The issue resolved by the Court of Appeals have never been passed upon in any decision of this Court. This being so, injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard. [footnote deleted.]

This Court also noted in a footnote to that passage that the examples it mentioned of circumstances in which an appellate court is justified in resolving issues not passed on below were not intended to be exclusive, 428 U.S. at 121 fn.8.

This Court noted in *Singleton* that the issue of the scope of a Federal appellate court's authority to address issues for the first time on appeal is left primarily for that court's discretion. It is respectfully submitted that that discretion was abused in this case. Initially, it should be noted that this case involved a complex series of negotiations and contracts and thus it involves obligations voluntarily undertaken by the parties and not obligations imposed, as in tort cases or public regulation cases, by a governmental entity, see *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961). Thus, the policy considerations justifying an appellate court addressing issues for the first time on appeal and altering the decisional matrix of the trial court are not as strong in this type of case. Additionally, all the parties in the case *sub judice* were residents of Milwaukee at the time of the negotiation and execution of the contracts at issue, and they were all experienced businessmen and real estate entrepreneurs. The parties stipulated that Wisconsin law should apply to the formation and interpretation of the contracts that they voluntarily entered into and the necessary inference of that stipulation was that

they were operating under that assumption at the time those contracts were negotiated and drafted. Despite the understanding of the parties as to the legal principles governing their contracts and their expectations that that law would be applied in case of controversy, the Court of Appeals for the Eleventh Circuit *sua sponte* determined that Florida law would apply to all aspects of those contracts.

Neither of the exceptions noted in *Singleton* justify the Eleventh Circuit's action in this case. Proper resolution of the conflict of laws issue in this case is not beyond any doubt since, as noted in the Petition for Rehearing, the Florida cases relied upon by the Eleventh Circuit addresed matters of interpretation of actual conveyances and not all contracts that had any relationship to real property transactions. This distinction is recognized in Florida law:

> Contracts or agreements directly concerning real estate or the title thereto should be carefully distinguished from those which, while associated with or collateral to the realty, are in reality purely personal. Agreements of the latter nature will in all cases be governed by the usual rules of contract, and would not be influenced at all by the *Lex Rei Sitae* [footnote deleted.]

10 Fla.Jur.2d, Conflicts of Law §25 pg. 173 (and cases cited therein). Additionally, as stated in the Eleventh Circuit decision, Florida law provides that it will apply to determine the *validity* of contracts of conveyance, but no case has squarely held that Florida law applies to *all* aspects of such contracts. Therefore, it cannot be said that the proper resolution of this issue was beyond any doubt.

There is also no basis to conclude that the Eleventh Circuit was compelled to substitute Florida law for Wisconsin law in this case to avoid an injustice. While application

of Wisconsin law resulted in rulings on certain legal issues which were favorable to the Petitioner, nonetheless Zetley obtained a favorable judgment in his Third Party Claim for the full amount of damages he sought. He has never claimed that that award was inadequate and therefore, it cannot be said that he would suffer any injustice by the application of Wisconsin law.

Other Federal circuits have held that absent a miscarriage of justice an appellate court should not address choice of law issues not properly raised below, *Babb v. Schmidt, supra; Michael-Regarngeean Co., Inc. v. Lindell, supra.* The Eleventh Circuit decision in the case *sub judice* conflicts with those cases since it addressed *sua sponte* a choice of law issue where there is no miscarriage of justice nor even any allegation of a miscarriage of justice. This Court should accept jurisdiction to resolve that conflict and to clarify the limitations discussed in *Singleton v. Wulff, supra,* regarding an appellate court's discretion to resolve questions for the first time on appeal.

CONCLUSION

The Court of Appeals for the Eleventh Circuit exceeded its proper role as an appellate court in addressing sua sponte a choice of law issue that had been stipulated to in the trial court and not raised in the court of appeals. This Court should grant the Petition for Writ of Certiorari and address the limitations of an appellate court's authority to address issues not properly brought before it.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 84-977-CIV-ORL-18

XANADU OF COCOA BEACH, INC., a Florida corporation,
Plaintiff,

vs.

MARVIN A. ZETLEY,
Defendant/Third-Party Plaintiff,

vs.

C & C DEVELOPMENT, INC., a Florida corporation, and KENNETH E. ALLES,
Third-Party Defendants.

FILED
May 2, 1986

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This ejection action was tried before the Court without a jury on December 17-18, 1985. Based upon the parties' admitted facts in their pre-trial stipulation, the testimony and the evidence admitted at trial, the Court enters the following findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

Findings of Fact

The pertinent facts of this case span 1980 to the present and numerous real estate transactions. On October 31, 1980, plaintiff, Xanadu of Cocoa Beach, Inc., a Florida corporation and wholly owned subsidiary of Towne Realty Inc., a Wisconsin corporation, and Sunflower Club, Inc. (Sunflower), a Florida corporation, entered into a joint venture agreement (Xanadu Joint Venture) for the purpose of

developing Xanadu, a condominium project located in Brevard County, Cocoa Beach, Florida. (Zetley Exhibit 43) The agreement was signed for plaintiff by Joseph J. Zilber, and for Sunflower by third-party defendant Kenneth Alles, who also personally guaranteed the joint venture. The Xanadu Joint Venture agreement was amended on December 15, 1981, to assure that Xanadu of Cocoa Beach, Inc. would receive its portion of profits, advances and costs from the project prior to any profit payment to Sunflower. (Zetley Exhibit 44) The amendment was signed by Towne Realty, by Zilber as chairman of the board for Xanadu of Cocoa Beach, Inc., by Alles as authorized officer for Sunflower and by Alles individually and as guarantor.

Zilber is a Milwaukee real estate entrepreneur, who operates through corporations and subsidiaries. For example, Towne Realty, of which plaintiff is a wholly-owned subsidiary, is itself a wholly-owned subsidiary of Zilber, Ltd. Alles has been involved in Florida real estate transactions since the early 1970's. Sunflower was his corporation although the stock was held by his wife. For purposes of Xanadu Joint Venture, plaintiff shared office space and employees with Alles in Cocoa Beach.

Defendant and third-party plaintiff Zetley is a metropolitan Milwaukee resident, who is an invester in nursing homes, pharmaceutical businesses, and real estate. Zetley was involved in a previous business transaction with Zilber whereby Zetley serviced Zilber nursing homes with pharmaceuticals. Zetley has known Gerald Stein, executive vice president of Towne Realty, for twenty-five years. Prior to May 20, 1982, Zetley owned the Brown Deer Racquet Club (Brown Deer) in Milwaukee. This facility included indoor and outdoor tennis courts, an outdoor swimming pool, and a clubhouse with a restaurant, bar and locker room. Zetley had entered negotiations regarding a real estate transaction involving Brown Deer through an

intermediary, Alan Dolenshek. A Milwaukee resident until 1985, Dolenshek is co-owner of a Cocoa Beach title company and has beeen involved with exchanges or trades of real estate. Having known Alles and his real estate involvement for twenty years, Dolenshek engineered a trade transaction between Zetley and Alles' Florida corporation and third-party defendant, C & C Development, Inc. (C&C). On May 20, 1982, Zetley traded his equity in Brown Deer for condominium units 505, 1204, and penthouse 2 in Xanadu, which was under construction. (Although the subject penthouse is referenced alternatively as penthouse 2 and penthouse H in the various exhibits, they are the same penthouse.)

Several real estate transaction documents were executed on May 20, 1982, which affect, but are not dispositive of the interests in this action. The closing statement evidences the acquisition from Zetley of Brown Deer by C&C, signed by its principal officer, Alles. (Zetley Exhibits 1 and 3) Also on May 20, 1982, Alles signed for C&C and personally guaranteed a promissory note stating the obligation of C&C to pay Zetley the balance of $290,298.34 for the Brown Deer trade. (Zetley Exhibit 9) The note states that C&C will convey Xanadu penthouse and 505 units by warranty deed to Zetley on or before April 1, 1983 or pay Zetley $500,000.00 cash without interest on May 1, 1983. Alles signed for C&C and personally guaranteed another promissory note on May 20, 1982, agreeing to pay $150,000.00 to Zetley on June 2, 1982, or to transfer to Zetley by warranty deed title to Xanadu condominium unit 1204. (Zetley Exhibits 10 and 11)

Furthemore, on May 20, 1982, C&C leased the Brown Deer restaurant, bar and snack bar to Brown Deer Racquet Club, Inc., a Wisconsin corporation. (Zetley Exhibit 8) Signed by Alles as principal for lessor C&C and Zetley as principal for lessee Brown Deer Racquet Club, Inc. and

guarantor, the lease commenced on May 20, 1982, and terminated April 30, 1984. The lease provides for lessor C&C's interest to be assigned to Mequon Racquet Club, Ltd. (Mequon), a Wisconsin limited partnership, whereupon it would have the right to reassign lessor's interest back to the original lessor. The Mequon partnership was headed by George A. Eisen, who had entered negotiations with Dolenshek for the purchase of Brown Deer upon the closing between Zetley and C&C. On May 21, 1982, Alles for C&C executed a land contract with Mequon selling Brown Deer for $1,267,100.00 allowed by the lease between C&C and the Brown Deer Racquet Club, Inc. (Zetley Exhibit 7)

On June 2, 1982, a memorandum agreement was executed by Zetley, C&C and Alles. (Zetley Exhibit 14) This agreement stated that, as part of the consideration for the notes from C&C to Zetley, guaranteed by Alles, if C&C and/or Alles were unable to deliver the Xanadu condominium units when specified in the notes, then C&C guaranteed by Alles would pay Zetley interest at 20% per annum on the unpaid balance until three months after the due date of the notes. If the Xanadu units could not then be delivered because of natural causes, then C&C and Alles would deliver to Zetley three Cocoa Beach condominium units of comparable value.

Having undergone coronary bypass surgery, Zetley found it necessary to curtail his physical, business involvement. Consequently, on November 11, 1982, an agreement was signed by Zetley for Brown Deer Racquet Club, Inc. and by Alles individually and for C&C, which relinquished Zetley's claim to Xanadu unit 505 and compensated him $15,000.00. (Zetley Exhibit 17) The agreement provided that commencing December 31, 1982, C&C and Alles would accept assignment of the interest of lessee Brown Deer Racquet Club, Inc. C&C and Alles further agreed to hold Brown Deer Racquet Club, Inc. and Zetley harmless and

to indemnify them against any claims under the lease. On January 1, 1983, C&C and Alles personally agreed to compensate Zetley $20,000.00 for the inventory in the restaurant, including liquor and food. (Zetley Exhibit 18) In the alternative, C&C and Alles agreed to pay Zetley in furnishings for Xanadu units 1204 or the penthouse. The cash or furniture payment was to be paid no later than forty-five days after issuance of certificates of occupancy by the City of Cocoa Beach, or interest of 15% per annum would accrue.

Xanadu was completed in Spring, 1983, and certificates of occupancy for the subject units were issued. Zetley frequently requested that Alles deliver title to units 1204 and penthouse 2. Zetley wanted the penthouse for his personal use and unit 1204 had become part of another real estate trade transaction. This transaction was with O'Keefe Centre, Ltd., a Michigan corporation, whereby Zetley acquired an interest in a Michigan nursing home. Part of the transaction involved Zetley's delivery of title to Xanadu unit 1204. (Zetley Exhibits 23, 24 and 48) The May 13, 1983 warranty deed between Xanadu Joint Venture and O'Keefe Centre, Ltd., was signed by Alles as president of Sunflower and by Ben L. Ross as vice president of Xanadu of Cocoa Beach, Inc. (Zetley Exhibit 48) Following the May 13, 1983 closing, Zetley was under pressure from the Michigan corporation to deliver title evidence and a deed to unit 1204. Consequently, Zetley requested Zilber's assistance in acquiring deeds to unit 1204 and penthouse 2. Zilber's solution was to effect the release of Xanadu unit 1204 in exchange for Zetley's giving as collateral the assignment of his $100,000.00 promissory note from Unicare Health Facilities, Inc., a Wisconsin corporation, the balance of which was $80,000.00, to C&C and Alles. (Zetley Exhibits 49, 50 and 51) With respect to the Xanadu penthouse, Alles individually and for C&C signed an agreement on June 30, 1983, agreeing to deliver clear title by

October 31, 1983, or to pay Zetley $50,000.00 for furnishing the penthouse before receiving title pursuant to the May 20, 1982 note plus $25,000.00 damages. (Zetley Exhibit 19)

On August 21, 1983, the Mequon partnership, which had purchased Brown Deer from C&C and Alles, executed a quit claim deed to C&C. (Zetley Exhibit 27) The quit claim deed was transmitted to C&C by letter dated August 22, 1983, which stated that Mequon had surrendered all right, title and interest under the May 21, 1982 land contract. (Zetley Exhibit 29) On August 22, 1983, Alles for C&C executed a warranty deed for the former Brown Deer to John D. Huber. (Zetley Exhibit 75)

On October 6, 1983, a mutual general release was executed by Zetley, C&C and Alles. (Zetley Exhibit 33) The release states that Zetley had conveyed Brown Deer and the Unicare note, valued at $80,000.00, to C&C and Alles and that C&C and Alles had conveyed Xanadu unit 1204 to Zetley. The release further provides that in order "to settle all disputes and differences" among the parties, C&C and Alles would make additional covenants as consideration. This consideration by C&C and Alles was: the free and clear conveyance of certain Wisconsin real estate on or before November 1, 1983, and the conveyance of Xanadu penthouse 2 on or before March 1, 1984. In the event, however, that penthouse 2 could not be delivered free and clear by March 1, 1984, interest would accrue at 20% per annum, commencing October 1, 1983, to the date of conveyance on a principal of $350,000.00.

Furthermore, if penthouse 2 were not conveyed by March 1, 1984, then C&C and Alles would pay Zetley for all furnishings and a liquidated damages penalty of $25,000.00. Should the penalty provision apply and be paid, the furnishings were to become property of C&C and

Alles. The agreement released the parties from all previous actions and claims that they had against each other. The parties certified therein that "there exists no understanding or agreement in modification of this general mutual release, and there are no exceptions to this release." Dolenshek testified that the mutual general release resolved previous notes between the parties, that is the May 20, 1982 notes for $150,000.00 and $500,000.00, and that he was not aware of any obligations between Zetley, C&C and Alles outside the release.

Following his execution of the October 6, 1983 mutual general release, Zetley signed a letter agreement with Towne Realty on October 10, 1983. (Zetley Exhibit 35) This agreement concerned Xanadu unit 1204. Therein, Towne Realty acknowledged that Xanadu Joint Venture owned unit 1204; that the warranty deed to unit 1204 was enclosed; and that Towne Realty agreed to pay First of Boston Mortgage Corporation, financier for Xanadu, $125,000.00 for release of the first mortgage lien on the unit. In consideration, Zetley agreed to relinquish all rights in the Unicare note, face amount of $100,000.00, which he assigned to C&C Towne Realty. Also in consideration, Zetley agreed to the following significant provision:

> In consideration of Towne Realty, Inc.'s release of the aforesaid deed and payment of the release price to First of Boston Mortgage Corporation, by execution of a copy of this letter, you also agree to and do release Towne Realty, Inc., Xanadu of Cocoa Beach, Inc. and all of their offices, agents, employees and directors (C&C Development, Inc. and Kenneth E. Alles are not included within the terms of this release) from any and all claims or causes of action, known or unknown, which you might otherwise have from the beginning of the time to the present.

Also on October 10, 1983, C&C and Alles reassigned the Unicare note to Towne Realty. (Zetley Exhibit 52). In the early part of October 1983, Zetley was given a key to penthouse 2 by an employee of Towne Realty/Xanadu of Cocoa Beach, Inc. He spent a substantial amount in furnishing and decorating the penthouse. Zetley and his family occupied penthouse 2 before Christmas 1983, and he has retained possession and occupancy to date. His presence has been known by members or agents of Xanadu Joint Venture.

On April 18, 1984, Xandu Joint Venture was terminated by written agreement signed by Arthur W. Wigchers, Jr., financial vice president of Towne Realty from 1982-1984, and by Alles individually and for Sunflower. (Zetley Exhibit 45) Therein plaintiff agreed to convey on the same day two condominium units to Sunflower and Alles and/or their designees by warranty deed. (Zetley Exhibits 45, 56 and 57) The remaining, unsold units, including penthouse 2, were conveyed by Xanadu Joint Venture to plaintiff by warranty deed on April 18, 1984. (Xanadu Exhibit 2) Since April 18, 1984, plaintiff has been the record title owner of penthouse 2. Wigchers testified that the penthouse has never been sold by plaintiff to Zeltley. He further testified that Zetley has never paid the monthly rent of $1,500.00 during his occupancy.

Zetley testified that Stein assured him during December, 1983 that Zilber would see that Zetley acquired title to penthouse 2. It was Alles at C&C, however, to whom Zetley wrote letters on February 17, 1984, and April 18, 1984, requesting title to penthouse 2. (Zetley Exhibits 37 and 38) Receiving no response, Zetley informed C&C and Alles on July 19, 1984, that they owed him $408,334.00 for the October 1, 1983 note, and $75,000.00 expenses for furnishing penthouse 2 and that no response would result in

a collection action. (Zetley Exhibit 39) He also requested that the electric account be placed in the name of C&C and/or Alles. Zetley did sue C&C and Alles in federal court in Wisconsin, which action was dismissed without prejudice for improper venue and lack of jurisdiction. Zetley filed and recorded a notice of lis pendens against penthouse 2 on December 11, 1984 in the Florida Circuit Court for Brevard County. Thereafter, the case was removed to federal court in the Middle District of Florida.

In this action, plaintiff has sued Zetley for ejectment from Xanadu penthouse 2 to which it holds title and for slander of title. Plaintiff alleges that the notice of lis pendens is without basis in law or fact; the notice of lis pendes was dismissed by the Court upon plaintiff's motion. Zetley has asserted the affirmative defenses of fraud with respect to the joint venture which excluded his ownership claims to penthouse 2 and of laches. Zetley has counterclaimed for declaratory relief establishing and quieting title to penthouse 2 in his name or, alternatively, $350,000.00 damages, the alleged reasonable value of penthouse 2. As third-party plaintiff against C&C and Alles, Zetley requests specific performance of the contract for delivery of clear record title to penthouse. In the alternative, Zetley seeks compensatory damages of $350,000.00 plus 20% per annum interest commencing October 1, 1983, for failure to receive title to penthouse 2. Furthermore, because third-party defendants failed to deliver title to penthouse 2 by October 31, 1983, Zetley claims $75,000.00 as stipulated damages pursuant to an additional agreement executed by third-party defendants. Third-party defendants have counterclaimed against Zetley for damages for breach of contract and for fraud and misrepresentation regarding the sale or trade of Brown Deer. Zetley not only denies any fraud or misrepresentation in connection with the sale or trade of Brown Deer but also any damages allegedly suffered by third-party defendants inasmuch as Brown Deer was resold by them at a substantial profit.

Conclusions of Law

The Court has diversity jurisdiction of this action pursuant to 28 U.S.C. §1332 because plaintiff is a Florida corporation and defendant/third-party plaintiff is a Wisconsin citizen. The Court has ancillary jurisdiction over the claims of the third-party plaintiff against third-party defendants, which are Florida citizens and residents, and over the counterclaim of third-party defendant C&C. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). The amount in controversy exceeds $10,000.00 exclusive of interest and costs.

In a diversity action, the district court must apply the conflicts of law principles of the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941); *Acme Circus Operating Co. v. Kuperstock*, 711 F.2d 1538, 1540 (11th Cir. 1983). Under Florida law, issues concerning the execution, validity, interpretation, and obligations of a contract are determined by the law of the place where the contract is made; matters regarding performance are determined by the law of the place where the contract is to be performed; and remedies are determined by the law of the forum state. *See Automated Medical Laboratories, Inc. v. Armour Pharmaceutical Co.*, 629 F. 2d, 1118, 1122 n.3 (5th Cir. 1980); *Starkenstein v. Merrill Lynch Pierce Fenner & Smith Inc.*, 572 F.Supp. 189, 191 (M.D.Fla. 1983); *Goodman v. Olsen*, 305 So. 2d 753, 754-55 (Fla. 1974). The Court, therefore, concurs with the parties in their pre-trial stipulation, plaintiff's trial brief and in their respective post-trial briefs that the law of Wisconsin, the place of execution, governs claims regarding formation and terms of the subject contracts while the law of Florida, the location of the subject condominium and forum state, governs performance and remedies under the contracts.

With respect to plaintiff's ejectment action, the Court concludes that ownership of penthouse 2 and the letter agreement between Towne Realty and Zetley are controlling. Penthouse 2 was owned by Xanadu Joint Venture until April 18, 1984, when plaintiff became the record title owner. (Xanadu Exhibit 2) On October 10, 1983, when Zetley signed the letter agreement with Towne Realty, of which plaintiff is a wholly owned subsidiary, he agreed to release Towne Realty, plaintiff, and all their employees and agents from any claims existing at that time. (Zetley Exhibit 35) C&C and Alles were specifically excepted. By this agreement, Zetley acquired the warranty deed to Xanadu unit 1204 and he relinquished his claim to penthouse 2.

Since the letter agreement was entered into in Wisconsin, Wisconsin law controls the application and interpretation of the agreement. Decisions by the Supreme Court of Wisconsin have held that a contracted release speaks for itself and governs the parties unless there are inherent contradictions or ambiguities within the document. *Pokorny v. Stastny*, 51 Wis. 2d 14, 186 N.W. 2d 284 (Wis. 1971); *Plummer v. Leonhard*, 44 Wis. 2d 686, 172 N.W. 2d 1 (Wis. 1969). Regarding apparent conflicts within a release concerning the terms, *Plummer* states:

> *** "as otherwise stated the rule is that, if an intent to limit the scope of the release appears, it will be restricted to conform to such intent. The foregoing general rule has been said to be merely a rule of construction not a strict rule of law, and to be inefficacious to control a court as against the obvious intention of the parties." (citation omitted) While great liberality is allowed in construing releases, the operation will be limited to those things within the contemplation of the parties at the time of the execution of the release. (citation omitted) The determination of the intent of the parties to release and the scope of the release is a question of fact . . . .

Plummer v. Leonhard, 172 N.W.2d at 4. At trial, the Court found the letter agreement to be clear and unambiguous in its terms. The parties were experienced businessmen, who were aware of their past dealings and of any claims that they may have had against each other. Furthermore, if Zetley alone erred in his interpretation of the release, then the release remains in effect because a release will be set aside only in the event of a mutual mistake, not a unilateral misunderstanding. *See Krezinski v. Hay,* 77 Wis.2d 569, 253 N.W. 2d 522 (Wiss. 1977); *Doyle v. Teasdale,* 263 Wis. 328, 57 N.W.2d 381 (Wis. 1953). The Court concludes that Zetley has no claim against plaintiff for title to penthouse 2 pursuant to the terms of the letter agreement with Towne Realty.

Since plaintiff is the record title holder for Xanadu penthouse 2 and Zetley has no claim to title against plaintiff, and, furthermore, has never paid rent, it follows that Zetley has been in wrongful occupancy and that ejectment is appropriate. Xanadu penthouse 2 is located in Florida and, therefore, Florida law controls the ejectment action. Ejectment is governed by chapter 66 of the Florida Statutes. In addition to abolishing common law ejectment, section 66.011 states that plaintiff may bring an ejectment action "directly against the party in possession or claiming adversely." *Byrd v. Culver,* 376 So.2d 41 (Fla. 4th DCA 1979) set forth the requirements for a ejectment action:

> To prevail in an action for ejectment, a party must demonstrate both legal title and a present right to possession of the property, *Blitch v. Sapp,* 142 Fla. 166, 194 So. 328 (1940), and *Williams v. Guthrie,* 102 Fla. 1047, 137 So. 682 (1931). Here plaintiffs establish legal title to the property by the unobjected to admission of a warranty deed and an administrator's deed. A right to immediate possession of the property was established by both documents and the uncontroverted testimony.

Id. at 42.

In this case, plaintiff holds record title to penthouse 2 and any possessory claims Zetley could advance were extinguished by his signing the release with Towne Realty. Plaintiff is entitled to possession of Xanadu penthouse 2, and Zetley must vacate the premises by June 1, 1986. Under Florida law, plaintiff is entitled further to the rental value of penthouse 2 during the time of Zetley's wrongful occupancy as plaintiff's measure of damage. *See Kester v. Bostwic,* 153 Fla. 437, 15 So.2d 201, 205 (Fla. 1943) (en banc). Accordingly, Zetley owes plaintiff $1,500.00 per month rent from the time of his wrongful occupancy in December, 1983 through May, 1986 when he vacates the premises ($45,000.00).

Plaintiff's slander of title claim is without merit in that the Court has discharged the notice of lis pendens. No evidence was presented showing the loss of a potential sale of the penthouse because of the notice of lis pendens, and plaintiff has submitted no proof of the attorneys' fees which it claims because of the alleged improper recording of the lis pendens. Accordingly, plaintiff is not entitled to recover for slander of title. *See Glusman v. Lieberman,* 285 So.2d 29, 31-32 (Fla. 4th DCA 1973); *Gatges v. Utsey,* 177 So. 2d 486, 488 (Fla. 1st DCA 1965).

Zetley has asserted the affirmative defenses of fraud and laches. With respect to fraud, he has alleged that an agency relationship existed between plaintiff Towne Realty and Alles because of the joint venture. Consequently, Zetley has alleged that his transactions with Alles and C&C included plaintiff by virtue of apparent authority based on the joint venture relationship. Zetley, therefore, contends that his various transactions with Alles and C&C, including the Brown Deer trade, involved collusion by the joint venture partners to defraud him and to ultimately

deprive him of penthouse 2.

Since Wisconsin law will apply to contracts executed in Wisconsin and the subject documents regarding Zetley's trade of Brown Deer and the acquisition of penthouse 2 were executed in Wisconsin, Wisconsin law governs Zetley's allegations of fraud. Wisconsin Statutes Annotated, section 706 controls conveyancing of land and comprises Wisconsin's statute of fraud. Wisconsin Statutes Annotated, section 706.01(3) states that a land conveyance must be a "written instrument" and that it must satisfy the following pertinent requirements of Wisconsin Statutes Annotated, section 706.02:

> 1. Transactions under §706.01(1) shall not be valid unless evidenced by a conveyance which:
>
> A. Identifies the parties;
> B. Identifies the land;
> C. Identifies the interest conveyed, and any material term, condition, reservation, exception or contingency upon which the interest is to arise, continue or be extinguished, limited or encumbered; and
> D. Is signed by or on behalf of each of the grantors; and
> E. Is signed by or on behalf of all parties, if a lease or contract to convey; . . . .

Wisconsin Statutes Annotated, §706.02. With respect to plaintiff and Zetley, there are no conveyancing documents regarding Xanadu penthouse 2.

Furthermore, the Wisconsin Supreme Court has held that the lack of assent by the parties to a real estate transaction is fatal: "In order for a real estate transaction to be enforceable under Sec. 706.04, it must at least be proved that the grantor or grantors assented to it. The assent of the parties is an essential element of even the most

informal agreements. The lack of it is necessarily fatal."*Nelson v. Albrechtson*, 93 Wis.2d 552, 287 N.W.2d 811, 816 (Wis. 1980). *Nelson* also stated that authorization to act for another in the sale of real estate may not be implied:

> Authorization to act on behalf of another in a transaction for the sale of real estate may not be implied. Sec. 706.03(1), Stats., provides:
>
> > "A conveyance signed by one purporting to act as an agent for another shall be ineffective as against the purported principal unless such agent was expressly authorized, and unless the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgment. The burden of proving the authority of any such agent shall be upon the person asserting the same."

Id. Regarding the requirements of section 706.03(1)*Nelson* cited *Glinski v. Sheldon*, 88 Wis.2d 509, 276 N.W.2d 815, 819 (Wis. 1979) stating: "[T]his section 'by its clear wording sets forth two distinct requirements: (1) an express authorization of agency; *and* (2) the authorizing principal is identified as such in the conveyance or in the form of signature or acknowledgment.'" *Nelson v. Albrechtson*, 287 N.W.2d at 816 (emphasis in original). Plaintiff's signature in its own capacity or as principal appears nowhere on the documents involved in the sale or trade of penthouse 2. Accordingly, Zetley's allegation of fraud on the part of plaintiff is without merit.

Zetley's defense of laches is analyzed under Florida law, the forum state. Laches follows the Florida statute of limitations for ejectment actions. *See Colhoun v. Greyhound Lines, Inc.*, 265 So.2d 18, 20 (Fla. 1972); *Pledger v. Burnup & Sims, Inc.*, 432 So.2d 1323, 1329

(Fla. 4th DCA 1983), *pet. for rev. denied*, 446 So.2d 99 (Fla. 1984). Florida Statutes, sections 95.12 and 95.13 state:

> Real property actions. -- No action to recover real property or its possession shall be maintained unless the person seeking recovery or his ancestor, predecessor, or grantor was seized or possessed of the property within 7 years before the commencement of the action.

§95.12, Fla. Stat.

> Real property actions; possession by legal owner presumed. -- In every action to recover real property or its possession, the person establishing legal title to the property shall be presumed to have been possessed of it within the time prescribed by law. The occupation of the property by any other person shall be in subordination to the legal title unless the property was possessed adversely to the legal title for 7 years before the commencement of the action.

§95.13, Fla. Stat. Because Zetley has never held legal title to penthouse 2, laches is not a defense to this ejectment action. *See Bridgehead Land Co. v. Hale*, 145 Fla. 389, 199 So. 361 (Fla. 1940).

Quieting title is an equitable action under Florida Statutes, chapter 65. Without valid title, however, Zetley's counterclaim to quiet title in his name is without merit:

> [I]n a suit to quiet title the plaintiff must show "with clearness, accuracy and certainty" the validity of his own title and the invalidity of the claim or act of the opposing party, and the plaintiff must rest upon the strength of his own title "and not upon the lack of right in the opposing party."

Huckins v. Duval County, 147 So.2d 551, 552 (Fla. 1st DCA 1962), *cert. denied,* 155 So.2d 150 (Fla. 1963) (citing *Brickell v. Trammell,* 77 Fla. 544, 82 So. 221 (Fla. 1919).

As third-party plaintiff, Zetley demands that third-party defendants C&C and Alles comply with their contractual agreements. First, Zetley seeks specific performance of delivery of the deed to penthouse 2, free of all encumbrances. Second, alternatively, he requests $350,000.00 plus interest at 20% per annum commencing October 1, 1983 for failure to deliver title to penthouse 2 by October 1, 1983 based upon a promissory note. Third, because C&C and Alles did not deliver title to penthouse 2 by October 31, 1983, Zetley seeks $75,000.00 as the cost of furnishings and damages.

With respect to delivery of an unencumbered deed to Zetley the Court concludes that C&C and Alles cannot deliver legal title to Zetley because they are not the record title holder. The Court incorporates its previous discussion regarding Wisconsin conveyancing. Zetley, however, is entitled to the amount of $350,000.00, and 20% per annum interest commencing October 1, 1983 until judgment, pursuant to the terms of the mutual general release executed by Zetley Exhibit 33)

The terms of the mutual general release are governed by Wisconsin law. The release terms are clear with respect to count II of Zetley's third-party complaint: the consideration for settling differences resulting from Zetley's prior conveyance of Brown Deer and the Unicare promissory note valued at $80,000.00 and for C&C and Alles' conveying Xanadu unit 1204 to Zetley is third-party defendants' conveyance to Zetley of various Wisconsin properties and unencumbered title to Xanadu penthouse 2 by March 4, 1984 or 20% interest per annum on a principal of $350,000.00 commencing October 1, 1983 until

conveyance. The parties to this settlement release were experienced businessmen, not novices to contracts and real estate transactions. As the Wisconsin Supreme Court stated in *Levin v. Perkins*, 12 Wis.2d 398, 107 N.W.2d 492 (Wis. 1961):

> We must assume when businessmen negotiate, incorporate the results thereof in writing and call it an agreement that they intended to accomplish something of a benefit to each.
>
> We agree the contract is a harsh one on the part of the defendant, but mutuality of obligation in a bilateral contract does not mean the liabilities of both parties or the benefits accruing must be equal. Neither does a contract lack mutuality of obligation merely because every obligation of one party is not met by an equivalent counter obligation of the other party. The mutuality of obligation means sufficient consideration, i.e., a promise needs consideration to be binding and enforceable. This is elementary. (citation omitted) A promise of one party to a bilateral contract may support one or more promises of the other party. While both parties must be bound in a bilateral contract so that in case of a breach by either, the other would have a right of action therefor, both parties need not be equally bound or to the same extent or have the same remedy for a breach. (citation omitted)

107 N.W.2d at 495.

Furthermore, Alles is not a stranger to trade transactions involving a condominium. *Goldman v. Bloom*, 90 Wis. 2d 466, 280 N.W.2d 170 (Wis. 1979), wherein Alles was a defendant but not a party to the appeal, is strikingly similar to the present case. *Goldman* involved the transfer of Wisconsin property for a twice-traded condominium in

the Bahamas. Goldman was given the key to the condominium, moved in, and furnished it. Alles, as intermediary, was dilatory in delivering the deed and he never recorded it. The trial court ordered transfer of the condominium to Goldman by the original owner despite that owner's argument that there was no consideration between himself and Goldman.

The present case is distinguishable from the equitable specific performance affirmed in *Goldman*. In this case neither C&C nor Alles ever had the deed to penthouse 2 and, therefore, could not convey it. The Court notes with interest, however, that following *Goldman*, Alles involved himself in a similar capacity in the present case. It appears to the Court that Alles was quite cognizant of his actions and of the ramifications. C&C and Alles did not deliver clear title to penthouse 2 by March 1, 1984, and, under the terms of the settlement release, they owe Zetley $350,000.00 plus 20% per annum interest on that principal commencing October 1, 1983 until judgment. Less than the agreed amount in the settlement release would be a windfall to C&C and Alles. Their arguments of lack of consideration fail because the parties have agreed to the consideration specified in the settlement release. *See Levin v. Perkins*, 107 N.W.2d at 495.

The release also provides that if conveyance of penthouse 2 were not made by March 1, 1984, then C&C and Alles would pay for all furnishings plus liquidated damages of $25,000.00. Pursuant to a June 30, 1983 agreement, C&C and Alles agreed to pay Zetley $50,000.00 for furnishings and $25,000.00 damages if the deed to penthouse 2 were not delivered by October 31, 1983. (Zetley Exhibit 19) Although the Court concludes that the mutual general release supercedes all other agreements between Zetley and third-party defendants, it notes that the penalty of $25,000.00 also is stated in the release. Zetley obviously

derived the figure of $75,000.00, alleged in the third count of his third-party complaint, from the cost of furnishings plus damages, thereby concurring that $50,000.00 is the accurate cost for furnishing penthouse 2. Furthermore, third-party defendants have agreed in their post-trial brief that Zetley is entitled to $75,000.00 for relinquishment of his interest in the furnishings. The Court concludes, therefore, that the uncontested $75,000.00 satisfies the requirement in the release that C&C and Alles pay Zetley $25,000.00 penalty for failure to deliver clear title by March 1, 1984 and the cost of furnishings, which is unstated. The Court concludes that $50,000.00 represents the cost of furnishings.

Third-party defendants' counterclaim against third-party plaintiff alleges fraudulent misrepresentations relating to Zetley's sale or trade of Brown Deer. Not only has there been no proof of fraud by a preponderance of the evidence, but also there has been no proof of financial loss or damages suffered by C&C and/or Alles pursuant to their Brown Deer trade transaction with Zetley. In fact, the Brown Deer property was the subject of two real estate transactions by C&C and Alles following their acquisition of Brown Deer from Zetley. The Court reiterates that third-party defendants, particularly Alles, were knowledgeable regarding real estate trade transactions and incorporates its former discussion regarding this aspect of the mutual general release between these parties. *See Goldman v. Bloom; Levin v. Perkins, supra.* Therefore, the counterclaim of the third-party defendants is without merit.

Accordingly, the Clerk shall enter judgment for plaintiff for Zetley's ejectment from Xanadu penthouse 2 by June 1, 1986, and $1,500 monthly rent from December, 1983 through May, 1986 ($45,000). Zetley takes nothing on his counterclaim. The Clerk shall enter judgment for Zetley

against third-party defendants in the amount of $350,000.00 and 20% per annum interest commencing October 1, 1983 until judgment plus $75,000.00. Third-party defendants shall take nothing on their counterclaim.

IT IS SO ORDERED in Chambers at Orlando, Florida, this 1st day of May, 1986.

/s/ illegible

G. KENDALL SHARP
United States District Judge

Copies to:

Bruce W. Jacobus
Irving D. Gaines
Robert E. Stope

APPENDIX B
JUDGMENT IN A CIVIL CASE

United States District Court — DISTRICT: Middle District of Florida/Orlando Diviaion

CASE TITLE
Xanadu of Cocoa Beach, Inc.
vs.
Marvin A. Zetley
vs.
C&C Development, Inc. and Kenneth E. Alles

DOCKET NUMBER
84-977-Civ-Orl-18

NAME OF JUDGE OR MAGISTRITE
Judge G. Kendall Sharp

☐ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding.

The issues have been tried and the jury has rendered its verdict.

Filed May 2 1986

X **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff, Xanadu of Cocoa Beach, Inc., is entitled to ejectment of the defendant/third-party plaintiff, Marvin A. Zetley from Xanadu Penthouse 2 by June 1, 1986, and $1,500.00 rent per month from December, 1983, through May, 1986 ($45,000.00) to bear interest at the rate of 6.31% per annum from the date of entry of this judgment as provided by law;

that the defendant/third party plaintiff, Marvin A. Zetley, shall take nothing on his counterclaim against plaintiff, Xanadu of Cocoa Beach, Inc.;

that the defendant/third party plaintiff, Marvin A. Zetley, is entitled to $350,000.00 and 20% per annum interest commencing October 1, 1983, until May 2, 1986, plus $75,000.00 from third/party defendants, C & & Development, Inc., and Kenneth E. Alles to bear interest at the rate of 6.31% per annum from the date of entry of this judgment as provided by law;

that the third-party defendants C & C Development, Inc., and Kenneth E. Alles shall take nothing on their counterclaim against defendant/third-party plaintiff, Marvin A. Zetley.

Copies to:

Harry C. Greenfield, Esquire
Irving D. Gaines, Esquire
Bruce W. Jacobus, Esquire

CLERK
DONALD M. CINNAMOND

DATE
MAY 2, 1986

(BY) DEPUTY CLERK
/s/ Janet McClung

APPENDIX C

XANADU OF COCOA BEACH, INC.,
Plaintiff-Counterclaim
Defendant-Appellee,

v.

Marvin A. ZETLEY, Defendant-Counterclaim
Plaintiff-Third-Party
Plaintiff-Appellant,

v.

C & C DEVELOPMENT, INC., and
Kenneth E. Alles, Third-Party
Defendants-Appellees.

United States Court of Appeals,
Eleventh Circuit.

July 24, 1987.

Former joint venturer brought action to eject purchaser. The United States District Court for the Middle District of Florida, No. 84-977-Civ-Orl-18, George Kendall Sharp, J., entered judgment in favor of joint venturer, and purchaser in favor of joint venturer, and purchaser appealed. The Court of Appeals, Lynne, Senior District Judge, sitting by designation, held that: (1) joint venture which orally agreed to convey penthouse purchaser would be liable for specific performance under Florida law where purchaser paid valuable consideration for penthouse to other joint venture, entered into possession of penthouse, and made valuable improvements with knowledge of joint venturer's officers; (2) release of joint venturer by purchaser in return for free and clear title to penthouse did not bar purchaser's claim for specific performance or claim that joint venturer participated in fault that deprived purchaser of his right to receive title to penthouse; and (3) district court erred in refusing to consider equitable defenses of laches and equitable estoppel.

Reversed and remanded.

Before TJOFLAT and HILL, Circuit Judges, and LYNNE*, Senior District Judge.

LYNNE, Senior District Judge:

This is an appeal from a judgment for the plaintiff in an ejectment action. On appeal, the unsuccessful defendant makes the following contentions: (1) that the trial court erred by failing to consider the doctrine of part performance, which might have enabled the defendant to prove the existence of an oral agreement to convey the subject realty; (2) that the trial court erred by failing to consider various agency doctrines that might have bound the plaintiff to such a contract; (3) that the trial court erroneously found the defendant's counterclaim to be barred by release; (4) that the trial court erroneously failed to consider the defendant's equitable defenses; and (5) that the trial court erroneously failed to grant the defendant affirmative relief based upon its counterclaim. We agree with the appellant and reverse the court below.

I. THE FACTS

The subject realty of the ejectment action below was Penthouse 2, a unit of Xanadu Condominiums at Cocoa Beach, Florida. Xanadu was a joint venture of the Sunflower Club, Inc., and Xanadu of Cocoa Beach, Inc. Xanadu Joint Venture held record title to the subject realty from October 31, 1980, when Sunflower and Xanadu of Cocoa Beach entered into the joint venture agreement, until April 18, 1984, when the joint venture was dissolved.

On May 20, 1982, the appellant entered into an agreement with Sunflower and Kenneth Alles, who was an

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* Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

officer and owner of Sunflower. According to the terms of the agreement, Alles and Sunflower would convey to Zetley several Xanadu condominium units, including Penthouse 2 and Unit 1204. In return, Zetley would convey to Alles his interest in the Brown Dear Racquet Club, in Milwaukee, Wisconsin. Alles was to assure delivery of the condominium units to Zetley on or before April 1, 1983; or failing that, was to pay Zetley $500,000 cash without interest, on May 1, 1984.

Because Alles failed to deliver title to Penthouse 2 and Unit 1204 on April 1, 1983, he and Zetley signed a mutual general release dated October 6, 1983. In that document, Alles agreed to deliver title to Penthouse 2 on or before March 1, 1984; if he could not deliver title on that date, then he would be indebted to Zetley in the amount of $350,000, upon which interest of 20 per cent per annum would accrue retroactively from October 1, 1983.

In October of 1983, Zetley took possession of Penthouse 2, allegedly with the aid of employees of Xanadu of Cocoa Beach which shared offices with Sunflower for the purposes of the joint venture. Specifically, Zetley alleges, an employee of Xanadu of Cocoa Beach or of Towne Realty, of which Xanadu of Cocoa Beach was a wholly-owned subsidiary, gave Zetley the key to Penthouse 2, and helped him furnish the penthouse. Zetley moved to Penthouse 2 in December of 1983. On October 10, 1983, Zetley executed a general release in favor of Xanadu of Cocoa Beach, Towne Realty, all of their agents, and others, in return for free and clear title to Xanadu Unit 1204. The release did not name Xanadu Joint Venture, which at the time held record title to Penthouse 2.

Alles never delivered title to Zetley for Penthouse 2, and on April 18, 1984, Sunflower and Xanadu of Cocoa Beach terminated Xanadu Joint Venture. Also on that

date, Xanadu Joint Venture conveyed Penthouse 2 by warranty deed to Xanadu of Cocoa Beach. Zetley apparently received no demand for possession of the unit until November, 1984, when he was served with the complaint that initiated this lawsuit. After a bench trial, the district court awarded possession of Penthouse 2, along with $45,000 rent, to Xanadu of Cocoa Beach. The court also found that third-party defendant, Kenneth Alles, was indebted to Zetley in the amount of $350,000, plus $75,000 liquidated damages, and interest. The district court further found that Zetley should take nothing on his countercliam.

II. DISCUSSION

A. *Choice of Law.*

[1] In the proceedings below, the parties and the court assumed that, because the contract between Alles and Zetley was signed in Wisconsin, Wisconsin law would determine the contract's validity, and would resolve questions concerning its formation. In Florida, however, the validity of a contract to convey an interest in real estate is governed by the law of the state in which the real estate lies. *Connor v. Elliott*, 79 Fla. 513, 85 So. 164, 165 (1920); *Kyle v. Kyle;* 128 So.2d 427 (Fla.Dist.Ct.App.1961). Because the realty lies in Florida, and because Florida is the forum state, all aspects of the contract—formation, validity, performance, and remedies—are to be determined in accordance with the principles of Florida law. The law of Florida, therefore, governs the validity and interpretation of any document or oral agreement intended to convey, or having the effect of conveying, any legal or equitable interest in Penthouse 2.

B. *Agency and Part Performance.*

[2,3] In his counterclaim, Zetley sought to hold

Xanadu of Cocoa Beach liable for specific performance of Alles' and Sunflower's contract to convey Penthouse 2. Although Xanadu of Cocoa Beach was not named to prove his case by relying upon principles of agency and upon the doctrine of past performance, neither of which the trial court considered. According to Florida law, however, a vendee is entitled to specific performances of an oral contract to convey realty if he can prove the terms of the contract and the following: (1) that he has paid part or all of the purchase price; (2) that he has taken possession of the realty; and (3) that he has made valuable improvements with the consent or acquiescence of the vendor. *Baker v. Rice*, 37 So.2d 837 (Fla. 1948). The undisputed facts in this case are that Zetley paid valuable consideration for the realty (at least to Alles), that he entered into possession of Penthouse 2, and that he made valuable improvements with the knowledge of officers of Xanadu Joint Venture.[1] Under these facts, it was error not to allow Zetley to prove that Xanadu Joint Venture might have been obligated to convey Penthouse 2.

[4] The undisputed facts show that the appellant is entitled to avail himself of the doctrine of part performance. By no means, however, is the doctrine a substitute for a contract; rather, it prevents the party who denies the contract's existence from asserting the statute of frauds. To prevail on its counterclaim, therefore, Zetley must prove that Xanadu of Cocoa Beach is bound by contract, either oral or written, to convey Penthouse 2 to Zetley. Moreover, no principle of Florida law precludes Zetley from proving his case by relying upon any of the various principles of agency, whether implied, apparent, actual, or by estoppel.

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[1] Knowledge of or notice to a partner, pertaining to a "matter concerning partnership affairs" is imposed to the partnership. Fla.Stat.Ann. § 620.615 (West 1977).

[5,6] Xanadu of Cocoa Beach could be contractually bound under either of the two following theories: First, at least for the purposes of this transaction, Alles may have been the agent of Xanadu of Cocoa Beach directly. For example, officers of Xanadu of Cocoa Beach might have led Zetley to believe that Alles was acting at their instigation and representing their interests. Second, Xanadu of Cocoa Beach might be bound by virtue of its having been a partner in the Xanadu Joint Venture. The joint venture, if a partnership, would be bound by the act of either of its members "for apparently carrying on in the usual way the business of the partnership." Fla.Stat.Ann. § 620.60(1) (West 1977).[2] If the joint venture were not a partnership, then the parties might be liable under Fla.Stat.Ann. § 620.60(1) (West 1977), which codifies the doctrine of partnership by estoppel.

C. *The Release.*

As with the original contract to convey Penthouse 2, the parties in the trial court assumed that Wisconsin law governed the validity of the release signed by Zetley on October 10, 1983. That document is relevant to this lawsuit only insofar as it is purported to release an equitable interest owned by Zetley in Penthouse 2. For the purposes of

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[2] We find that Fla.Stat.Ann. § 620.605 is not the only means by which a partnership might be held obligated under a contract to convey real property. For example, if a partnership led a third party to believe that it would honor a contract not naming the partnership and signed by only one partner, the... the partnership should be held estopped from denying its liability. *See* Fla.Stat.Ann. § 620.575(2) (West 1977).

Moreover, we interpret Fla.Stat.Ann. § 620.60 as proving that a partnership may be liable under a contract to convey realty, even if the partnerhsip is not actually named, if that is the partnerhsip's usual way of conducting business, and the obligee, in dealing with the partnership, is led to believe, by words or actions, or by silence in certain circumstances, that the partnership will continue to conduct business in that manner.

terest owned by Zetley in Penthouse 2. For the purposes of this lawsuit, therefore, it is a contract to convey an interest in real property, a contract whose validity, interpretation, and effect are governed by Florida, not Wisconsin, law.

[7,8] The appellant's counterclaim stated essentially two types of claims against Xanadu of Cocoa Beach, First, Zetley stated a claim for specific performance of a contract to convey Penthouse 2. Second, Zetley claimed that Xanadu of Cocoa Beach participated in a fraud that deprived Zetley of his right to receive title to Penthouse 2. The district court held that the release barred both claims, and we reverse. First, with respect to the fraud claim, no fraud could have been consummated until it was impossible for the partnership to convey Penthouse 2. Because the partnership could have dissolution, the fraud claim could not have accrued until after the release was signed. A release cannot affect a claim that has not yet matured. *Ciliberti v. Ciliberti*, 416 So.2d 48 (Fla.Dist.Ct.App.1982).

[9,10] As for the contract claim, the court notes that the release did not mention Xanadu Joint Venture, which held record title to Penthouse 2 at the time of the release's execution. Joint ventures in Florida are governed by the principles of partnership law.[3] When a partnership holds legal title and distinct from its partners. *See* Fla.Stat.Ann. § 620.595(3) (West 1977); *see also Century Bank v. Gillespy*, 399 So.2d 1109 (Fla.Dist.Ct.App.1981). If Zetley can prove that the joint venture was the obligor of an agreement to convey Penthouse 2 then the release of Xanadu of Cocoa Beach would not have operated *ipso facto* as a release of Xanadu Joint Venture, and the claim would

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[3] Joint ventures in Florida are governed by the law of partnership, if they meet the statutory requisites in Fla.Stat.Ann. § 620.585 (West 1977). But even if Sunflower and Xanadu of Cocoa Beach were not partners as between themselves, they might be liable for holding themselves out as partners to third parties. Fla.Stat.Ann. §620.635 (Wesr 1977).

not have been extinguished by the partnerhsip's dissolution or winding down. Fla.Stat.Ann. § 620.735(1) (West 1977). Thus, the October 10, 1983, letter agreement would not have released the partnership of its obligation, if any existed, to convey Penthouse 2; and, regardless of whatever claim was released against Xanadu of Cocoa Beach assumed the partnership's obligation when it received title to the condominium unit. The release, therefore, would not bar such a claim, but only such claims as existed against Xanadu of Cocoa Beach, in its own right, on October 10, 1983.

D. *Equitable Defenses.*

The trial court clearly erred in refusing to consider the equitable defenses of laches and equitable estoppel, both of which are available against ejectment actions in Florida. *Brown v. Johns*, 312 So.2d 526, 527 (Fla.Dist.Ct.App.1975) (citing *Cowgill v. Hopkins*, 52 So.2d 343 (Sup.Ct. of Fla. 1951), and *Bridgehead Land Co. v. Hale*, 145 Fla. 389, 199 So. 361 (1940)). The trial court erroneously cites *Bridgehead Land Co. v. Hale*, 145 Fla. 389, 199 So. 361 (1940), to support the proposition that the defense of laches is not available to a defendant who has not held record title. This court finds nothing in *Hale* that would support such an interpretation.

[11,12] This court is also of the opinion that the appellant might avail itself of the defense of equitable estoppel. True, the appellant did not plead estoppel explicitly, but the appellant's evidence supports an inference of estoppel, and the appellant pleaded fraud both in its counterclaim and as a defense. According to Florida law, fraud is a basis for invoking the doctrine of equitable estoppel. *See Rinker Materials Corp. v. Palmer First National*

Bank & Trust Co. 361 So.2d 156, 157 (Fla. 1978). Federal courts have the power to fashion equitable relief (such as applying the doctrine of estoppel) when facts warranting such relief have been pleaded and proved.

III. CONCLUSION

The appellant will be entitled to affirmative relief if he proves, in accordance with this opinion, either that the appellee breached an obligation it owed to convey Penthouse 2, or that the appellee defrauded appellant of some sort of right to have Alles convey Penthouse 2. The order of the district court is therefore REVERSED and REMANDED for further prodeedings in accordance with this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

XANADU OF COCOA BEACH, INC.,
a Florida corporation,
Plaintiff-Appellee,

vs. Case No. 86-3346

MARVIN A. ZETLEY,
Defendant-Appellant

APPELLEE'S MOTION FOR REHEARING

Appeal from the Judgment dated May 2, 1986
HON. G. KENDALL SHARP, U.S. District Judge,
United States District Court for the
Middle District of Florida, Orlando Division

BRUCE W. JACOBUS
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305/984-3842

PETITION FOR REHEARING OR CLARIFICATION

Plaintiff/Appellee, XANADU OF COCOA BEACH, INC., a Florida corporation, by and through its undersigned attorneys, hereby files this Petition for Rehearing or Clarification of this Court's decision dated July 24, 1987. Initially it should be noted that the grounds for this rehearing all derive from this Court's application of Florida law in the case *sub judice*. Since neither of the parties argues before this Court that Florida law should apply this Petition for Rehearing does not constitute reargument of matters previously presented to the Court.

1. THIS COURT ERRED IN APPLYING FLORIDA LAW WHEN NEITHER OF THE PARTIES EVER ASSERTED IN THE TRIAL COURT NOR BEFORE THIS COURT THAT FLORIDA LAW APPLIED TO THE AGREEMENTS BETWEEN THE PARTIES.

As noted in the Memorandum Opinion of the District Court the parties, in their pretrial stipulation and in their briefs presented before that court, agreed that Wisconsin law governed the issues of the formation and terms of the subject contracts and the claims arising therefrom. On appeal, the Appellant never argued to this Court that the trial court erred in applying Wisconsin law and therefore the Appellant should be bound to the position that it took before the trial court. Where a party fails to raise an issue in its brief the appellate court should not address that issue, MARTIN v. ATLANTIC COAST LINE RAILROAD CO., 289 F.2d 414, 417 (5th Cir. 1961). Additionally, where a party fails to raise a conflict of law question below the appellate court will not address it on appeal absent a miscarriage of justice, see MICHAEL-REGARNGEEAN CO., INC. v. LINDELL, 527 F.2d 653 (9th Cir. 1975); PELLERIN LAUNDRY MACHINERY SALES CO. v. REED, 300 F.2d 305 (8th Cir. 1962); BABB

C. SCHMIDT, 496 F.2d 957 (9th Cir. 1974). In this case no miscarriage of justice resulted from the trial court's application of Wisconsin law since, as evidenced by the parties' reliance on Wisconsin law throughout these proceedings, they assumed that it applied to the transactions at issue. As noted by the trial court in its memorandum opinion the parties in this transaction were knowledgeable and experienced businessmen and were not ignorant of the nature of the transactions they negotiated.

Additionally, even assuming *arguendo* that the equities favored the Defendant in this case, no miscarriage of justice occurred since the Defendant recovered a substantial judgment in his third party action arising out of the same transaction. For these reasons, the Court should not have *sua sponte* determined that Florida law applied in this case.

Additionally, this Court relied upon general statements in CONNOR v. ELLIOTT, 85 So. 164 (Fla. 1920), and KYLE v. KYLE, 128 So.2d (Fla. 2d DCA 1961) for the proposition that the validity of a contract to convey an interest in real estate is governed by the law of the state in which the real estate lies. However, those cases are factually distinguishable and the general statements of law contained therein must be considered in conjunction with the following limitation on that principle:

> Contracts or agreements directly concerning real estate or the title thereto should be carefully distinguished from those which, while associated with or collateral to the realty, are in reality purely personal. Agreements of the latter nature will in all cases be governed by the usual rules of contract, and will not be influenced at all by the *lex rei sitae*. [Footnote deleted.]

10 Fla.Jur.2d, Conflict of laws §25 p. 173 (and

cases cited therein); see also, 16 Am.Jur.2d, Conflict of Laws §27 pgs. 57-58. Thus, for example, in THOMPSON v. KYLE, 23 So. 12 (Fla. 1897) the Supreme Court of Florida held that while a mortgage on Florida real estate was governed by Florida substantive law, the note underlying the mortgage would be governed by the law of Alabama where that contractual agreement was made.

In this case, the letter agreement of October 10, 1983, while related to the condominium units in Xanadu, creates solely personal obligations and does not purport to convey any interest in real property. That letter agreement provides that Towne Realty would pay an existing obligation on a mortgage with First of Boston Mortgage Corporation and tender a warranty deed for a condominium unit in Florida while Marvin Zetley would assign a promissory note to Towne Realty. In addition, Zetley authorized the release of claims against Towne Realty, Xanadu of Cocoa Beach, Inc. and all of their officers, agents, employees and directors (excluding C & C Development, Inc. and Kenneth E. Alles). That letter did not specifically convey any real property, but simply memorialized the parties' personal obligations to perform certain acts including, *inter alia*, Towne Realty's delivery of a deed.

The case *sub judice* is thus distinguishable from the case relied upon by this Court, CONNOR v. ELLIOT, *supra*, which involved a suit on a deed of conveyance. In ELLIOTT the court specifically noted (85 So. at 166):

> This suit is not to enforce a personal obligation against a married woman. It is in the nature of a proceeding *in rem* against the property to enforce the lien thereon duly executed the married woman pursuant to the constitution and laws of this

state wherein the lands are situated. No personal property is involved.

Similarly, in KYLE v. KYLE, *supra*, 128 So.2d at 428 the plaintiff brought an action "seeking a decree declaring that the antenuptial agreement is valid and binding and that defendant has thereby relinquished her dower in Florida real estate, and making her joinder in any conveyance unnecessary." Thus, both CONNOR and KYLE involved actual contracts of conveyance which purported to convey an interest in property as opposed to agreements between parties that created solely personal obligations. In this present case, the obligations contained in the letter agreement of October 10, 1983 constituted solely personal obligations and, while those obligations were related to real property, that letter did not purport to convey any interest in real property. Therefore, as agreed by the parties below, Wisconsin law should govern the construction of that agreement.

This Court also concluded that the release contained in the letter agreement of October 10, 1983 was governed by Florida law because it purported to release an equitable interest of Zetley's in real property in Florida. It is respectfully submitted that the release is simply a general release that covers all forms of claims and causes of actions and does not specifically convey any interest in real property. If the terms of a general release contained in an agreement negotiated and executed in Wisconsin are to be governed by the law of Florida solely because there may be a claim with respect to real property in Florida, an element of uncertainty would be injected into business transactions that would be unnecessary and have potentially severe and far-reaching implications. Therefore, if this Court is not persuaded by the other arguments regarding the choice of law issue contained in this petition, Appellee would request that this Court certify to the Supreme Court of Florida the

issue as to whether a general release contained in a agreement which relates in part to the transfer of real property would necessarily be governed by Florida law simply because a potential claim relating to Florida real property might be included therein. It is respectfully submitted that the broad effect of such a holding justifies reference of that issue to the Supreme Court of Florida.

2. ASSUMING THAT FLORIDA LAW APPLIES TO THE RELEASE, THE RELINQUISHMENT OF ANY CLAIM AGAINST XANADU OF COCOA BEACH WOULD NECESSARILY INCLUDE THE RELEASE OF ANY CLAIMS AS TO THE XANADU JOINT VENTURE.

Assuming *arguendo* that Florida law applies to the release contained in the letter agreement of October 10, 1983 that release would have the legal effect of releasing any claim as to the Zanadu Joint Venture with respect to any purported duty to convey Penthouse 2 to the Defendant. That obligation or duty would be a joint obligation of Zanadu of Cocoa Beach and Zanadu Joint Venture pursuant to *Fla. Stat.* 620.63(2) (as distinguished from a joint and several obligation under *Fla. Stat.* §620.63(1)).

Florida common law provided that a release of a joint obligor operated to release all other joint obligors, see FEINER'S ORGANIZATION v. CAFFINA, 77 So.2d 852 (Fla. 1955); and that the release of a joint and several obligor operated to release all other joint and several obligors, PENZA v. NECKLES, 344 So.2d 1282 (Fla. 1977).

> with other persons for a claim shall not release or discharge the liability of any other person who may be liable for the balance of such claim.

That statute has been applied in a situation in which the obligation was joint *and* several, *see*, STEVEN BODZO REALTY, INC. v. WILLIS INTERNATIONAL CORP., 428 So.2d 225 (Fla. 1983).

However, *Fla. Stat.* §46.015 does not provide that the release of a person who is *only jointly liable* with other persons does not operate to discharge the liability of said other person. Since statutes which abrogate the common law are strictly and narrowly construed, ELLIS v. BROWN, 77 So.2d 845 (Fla. 1955), and since Florida law prior of *Fla. Stat.* §46.015 clearly held that the release of a party who was jointly liable with another person operated to release the other party, it appears clear that that is still the law in Florida. In light of the fact that the alleged obligation at issue in this case would be a joint obligation, the release of one of the joint obligors, i.e. Xanadu Joint Venture and thereby extinguish any such obligation. Therefore, under Florida law the release contained in the letter agreement of October 10, 1983 would operate to extinguish any purported claim of the Defendant to Penthouse 2.

3. THIS COURT SHOULD CLARIFY THE STATEMENT CONTAINED IN THE OPINION THAT, AS A MATTER OF LAW NO FRAUD COULD HAVE BEEN CONSUMMATED WITH RESPECT TO THE TRANSACTION AT ISSUE UNTIL IT WAS IMPOSSIBLE FOR THE PARTNERSHIP TO CONVEY PENTHOUSE 2.

In discussing the release in the opinion, this Court makes the statement that the release contained in the letter agreement of October 10, 1983 could not have operated

to extinguish any claim against Xanadu of Cocoa Beach for fraud because no fraud could have been consummated until after the release was executed. It is respectfully submitted that that statement is not entirely accurate and therefore requires some clairification. This Court apparently was considering that Zetley might be able to prove that Xanadu of Cocoa Beach participated in a fraud by dissolving the joint venture and conveying title to Penthouse 2 to itself, which conduct occurred after the letter agreement of October 10, 1983 was executed. However, there are other potential scenarios in which the alleged fraud could have occurred prior to the execution of the release and it is the Appellee's position that with respect to those claims the release operated to extinguish them.

At trial, Zetley attempted to demonstrate that Towne Realty was engaged in some form of fraud to deprive Zetley of the promissory note for $100,000 referred to in the letter agreement on October 10, 1983. Additionally, based on Zetley's allegations, at the new trial he may attempt to prove that various employees fraudulently induced him to take certain actions with respect to the transactions at issue which resulted in him transferring, *inter alia*, the promissory note other property rights. Florida recognizes the distinction between fraud in execution and fraud in inducement, see 27 Fla.Jur.2d, Fraud and Deceit, 6 page 291; COLUMBUS HOTEL CORP. v. HOTEL MANAGEMENT CO., 156 So. 893 (Fla. 1934); THOMAS v. ROLLINS, 298 So.2d 186 (Fla. 2d DCA 1974). With respect to any such claims by Zetley, any fraud in the inducement would have occurred prior to the execution of the release and therefore would be subsumed within the claims extinguished in said release. *See*, CORAL GABLES INPORTED MOTORCARS, INC. v. FIAT MOTORS OF NORTH SMERICA, INC., 673 F.2d 1234 (11th Cir. 1982).

If the Defendant attempts to prove that he was fraudulently induced by employees of the Plaintiff to engage in the transactions at issue, that form of fraud would have occurred prior to the execution of the release in the letter agreement of October 10, 1983. If Zetley attempts to plead ignorance of the tortious nature of those inducements that in itself would not justify initiating the letter agreement since in the letter agreement he specifically released any claims or causes of actions "known or unknown", see e.g., IN RE: HOLYWELL CORP., 49 B.R. 694 (BK. Fla 1985).

Therefore, Appellee respectfully requests that this Court clarify that portion of its opinion to reflect that the release could only be effective as to any alleged fraud which was consummated subsequent to the letter agreement of October 10, 1983.

CONCLUSION

For the reasons stated above, the Appellee respectfully requests this Court to grant rehearing in this case and alternatively to clarify its opinion.

Respectfully submitted,

/s/ Bruce W. Jacobus

BRUCE W. JACOBUS
Attorney for Xanadu of Cocoa Beach, Inc.,
Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that one (1) true copy of the Appellee's Motion for Rehearing was forwarded by United States Mail to Irving D. Gaines at Suite 726, 735 North Water Street, Milwaukee, Wisconsin 53202, this 12th day of August, 1987, with personal delivery to occur on the 13th day of August, 1987.

/s/ Bruce W. Jacobus

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APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Filed
Aug 27, 1987

No. 86-3346

XANADU OF COCOA BEACH, INC.,
Plaintiff-Counterclaim
Defendant-Appellee,

versus

Marvin A. ZETLEY,
Defendant-Counterclaim
Plaintiff-Third-Party
Plaintiff-Appellant,

versus

C & C DEVELOPMENT, INC.,
and Kenneth E. Alles,
Third-Party
Defendants-Appellees.

Appeal from the United Staes District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING

(August 27, 1987)

BEFORE: TJOFLAT and HILL, Circuit Judges, and LYNNE*, Senior District Judge

PER CURIAM:

The petition(s) for rehearing filed by appelee, Xanadu of Cocoa Beach, Inc., is *denied.*

ENTERED FOR THE COURT:

*Hon Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation

/s/ illegible
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

XANADU OF COCOA BEACH, INC.,
a Florida corporation,
Petitioner,

vs.

MARVIN A. ZETLEY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent agrees upon the issue presented by petitioner.

PARTIES TO THE PROCEEDING BELOW

In the proceedings before the United States District Court for the Middle District of Florida, Orlando Division, the plaintiff was XANADU OF COCOA BEACH, INC., a Florida corporation. The defendant was MARVIN A. ZETLEY. MARVIN A. ZETLEY was the third-party plaintiff against C&C DEVELOPMENT, INC., a Florida corporation, and KENNETH E. ALLES, as the third-party defendant.

Upon the appeal to the United States Court of Appeals for the Eleventh Circuit, the appellant was MARVIN A. ZETLEY (defendant below) and the appellee was XANADU OF COCOA BEACH, INC., (plaintiff below). C&C DEVELOPMENT, INC. and KENNETH E. ALLES did not participate in the appeal.

XANADU OF COCOA BEACH, INC. is the petitioner in this Court. MARVIN A. ZETLEY is the respondent in this Court.

RULE 28.1 LISTING

Counsel for petitioner did not submit this information in their brief. Therefore, it is provided herein by respondent. XANADU OF COCOA BEACH, INC. is a Florida corporation. It is a wholly owned subsidiary of TOWNE REALTY, INC., a Wisconsin corporation, located in Milwaukee, Wisconsin. TOWNE REALTY, INC. is a wholly owned subsidiary of ZILBER LTD, a Wisconsin corporation, located in Milwaukee, Wisconsin. ZILBER LTD. is wholly owned by family trusts established by JOSEPH J. ZILBER, a real estate entrepeneur, of Milwaukee, Wisconsin.

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No. 87-989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

XANADU OF COCOA BEACH, INC.,
a Florida corporation,
Petitioner,

vs.

MARVIN A. ZETLEY,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, MARVIN A. ZETLEY, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 822 F.2d 982 (1987).

RELEVANT OPINIONS AND ORDERS BELOW

1. The opinion of the Eleventh Circuit, issued July 24, 1987, is reported at 822 F.2d 982 (1987), and is reproduced at Appendix "C" of the petitioner's brief.

2. The order of the Eleventh Circuit dated August 27, 1987, denying the Petition for Rehearing submitted by appellee below is reproduced at Appendix "E" of petitioner's brief.

3. The Findings of Fact and Conclusions of Law of the Trial Judge in the United States District Court for the Middle District of Florida, Orlando Division, dated May 1, 1986, are unpublished and reproduced at Appendix "A" of petitioner's brief.

4. The Pretrial Stipulation in the Trial Court dated November 13 and 14, 1985, a copy of which is reproducted at Appendix "F" in respondent's brief.

STATEMENT OF THE CASE

The Statement of the Case and Facts, as presented by petitioner, must be clarified and more accurately and fully presented by respondent.

XANADU OF COCOA BEACH, INC., entered into a joint venture agreement with SUNFLOWER CLUB, INC., a Florida corporation, on October 31, 1980, for the purpose of developing and constructing a high-rise condominium building in Cocoa Beach, Florida. SUNFLOWER was controlled by KENNETH E. ALLES. The agreement created a joint venture, XANADU OF COCOA BEACH, a joint venture, (hereafter "XANADU JOINT VENTURE"). The document was signed by JOSEPH J. ZILBER for the petitioner and by KENNETH E. ALLES for SUNFLOWER.

For the purposes of operation of XANADU JOINT VENTURE, the joint venture and the petitioner shared offices and employees with ALLES in Cocoa Beach, Florida. ALLES and C&C contracted in May, 1982, with ZETLEY to trade Florida condominiums being constructed and owned by XANADU JOINT VENTURE for the Brown Deer Racquet Club in Milwaukee, which consisted of indoor and outdoor tennis facilities, restaurant and bar, and outdoor swimming facilities. Conveyance was made by ZETLEY to C&C on May 20, 1982, but ZETLEY did not then receive the deeds to the Florida condominiums. The problems flowed from there.

ZETLEY was aware at the inception of the transaction that XANADU JOINT VENTURE was a ZILBER-ALLES joint venture. From the inception of the transaction, and continually thereafter, ZETLEY was advised and reassured by ALLES that he had authority for the joint venture to enter into the transaction and commit to the delivery of the deeds to the condominium units. Similar reassurance was given ZETLEY on several occasions by Gerald Stein, an officer of all ZILBER and TOWNE REALTY entities, and a social friend of ZETLEY. As early as the Summer of 1982, Stein told ZETLEY not to worry about the future delivery of deeds, and that "JOE" (ZILBER) would take care of everything at the appropriate time. If a problem was going to exist and made known to ZETLEY at that time, it would have been feasible to reverse the transaction without difficulty. ZETLEY relied upon the Stein reassurances.

ZETLEY made a commitment for the disposition of one of the condominium units to O'Keefe Centre, Ltd., a Michigan corporation, in an unrelated business transaction, but had repeated difficulty in getting a deed to that unit (Unit 1204). Finally, ZETLEY met with ZILBER in June and July, 1983, to prevail upon ZILBER to release the deed for Unit 1204. This was accomplished.

Discussion was also had concerning the deed for the other unit, Penthouse Unit 2, but no deed was delivered. A memo was given by ZILBER to Arthur Wigchers, the then Vice President of both the petitioner and of TOWNE REALTY, which concluded:

> "Also make sure Kenny (Alles) gets Zetley to agree to hold off on the second Xanadu unit for a long time."

The letter agreement then entered into on October 10, 1983, between ZETLEY and TOWNE REALTY, which finally brought about the physical release and delivery direct to O'Keefe Centre of the deed to Unit 1204, and which petitioner denominates as a complete release, commenced with words reading:

"In Re: Xanadu Condominium Unit No. 1204"

During the same time interval, in early October 1983, ZETLEY was given a key to Penthouse Unit 2 by an authorized employee of TOWNE REALTY and the petitioner. He took possession of the unit in early October 1983. He undertook, with the aid and assistance of representatives of the joint venture, the completion and furnishing of the unit. He spent a minimum of $15,000.00 on the physical completion of the unit, and in excess of $25,000.00 to furnish the unit. He moved into physical possession with his family prior to Christmas of 1983. His presence was open and known to members, employees, officers, and agents of XANADU JOINT VENTURE, some of whom visited ZETLEY in his condominium unit on more than one occasion.

On April 18, 1984, without knowledge by ZETLEY, XANADU JOINT VENTURE was terminated and ALLES was given deeds to two unrelated condominium units in the development, and the petitioner obtained a deed to the balance of the unsold units, including Penthouse Unit 2, which is the subject of this controversy.

No demand was ever made upon ZETLEY to surrender possession and occupancy of the Penthouse Unit 2 until the Summons and Complaint issued in the Florida State Court was served upon ZETLEY on November 23, 1984, in Milwaukee. He had been in possession and physical occupancy since October, 1983. The case was then removed to the District Court on petition of ZETLEY. After the rendition of judgment in the Trial Court in favor of the petitioner, the respondent, ZETLEY, vacated the unit in question pursuant to the judgment, from which the appeal was taken. Since the undertaking of the appellate process, the petitioner sold the unit involved to a third party.

REASONS FOR DENYING THE WRIT

The parties did not clearly and plainly stipulate in the Pretrial Stipulation that Wisconsin law should apply to the formation and interpretation of the contracts. The Pretrial Stipulation, a copy of which is attached in respondent's Appendix as Appendix "F," at pp. A-1 - A-19 clearly shows in paragraph 8(4) that the parties agreed that Florida substantive law applied as related to the petitioner's Complaint. An agreement on the applicability of Wisconsin substantive law was made only as it related to the Counterclaim of the third-party defendant. That is a matter not involved in either the appeal or in this Petition. It is true that the Trial Judge did apply Wisconsin law to some aspects of this transaction, and that no argument was made by either party on this point in the Eleventh Circuit proceedings. The Eleventh Circuit, in its opinion, did determine in its Decision, 822 F.2d 982, at 984-985, that because the real estate in question, being the condominum in dispute, was situated in Florida, and that Florida was the forum state:

> "All aspects of the contract — formation, validity, performance, and remedies — are to be determined in accordance with the principles of Florida law. The law of Florida, therefore, governs the validity and interpretation of any document or oral agreement intended to convey, or having the effect of conveying, any legal or equitable interest in Penthouse 2."

Petitioner contends that the Eleventh Circuit had no power to undertake the consideration of this issue which had not been argued by either of the parties, and contends that *Singleton v. Wulff*, 428 U.S. 106, 49 L.Ed.2d 826, 96 S.Ct. 2868 (1976) constitutes authority for the proposition that a federal appellate court shall not consider an issue not passed on below. Speaking for the majority, Justice Blackmun stated at p. 121:

> "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to

> the discretion of the courts of appeal. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below . . . where injustices might otherwise result."

The subject was considered earlier in *Hormel v. Helvering,* 312 U.S. 552, 85 L.Ed. 1037, 61 S.Ct. 719 (1941), in which a challenge was made to the power of the Circuit Court of Appeals to pass upon questions that had not been directly and squarely presented to the Board of Tax Appeals below. Responding to this argument, Justice Black stated at 312 U.S 552, 557:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically argued would be out of harmony with this policy."

and, further at p. 558:

> " . . . such appellate practice should not be applied where the obvious results would be a plain miscarriage of justice."

Neither of the parties hereto were prejudiced by the fact that the Eleventh Circuit made a determination in its opinion at 822 F.2nd 982, 984-985, that Florida legal principles were to control certain issues in this case relating to the interpretation of the letter agreement between ZETLEY and TOWNE REALTY captioned "In Re: Xanadu Condominium Unit 1204," since neither side raised that issue on the appeal. It occurred on the Eleventh Circuit's own initiative because it obviously saw plain error of law that had to be corrected. Authority for such procedure can be found in *DeFonce Construction Company v. City*

of Miami, 256 F.2d 425, (5th Cir., 1958), where, at p. 428, the then 5th Circuit stated:

> " . . . this court can and will notice plain error called to its attention by counsel or appearing to our own observation."

Counsel for petitioner presents a tortured argument of the existence of an alleged conflict between the decision of the Eleventh Circuit in this case and with decisions of the Ninth Circuit. It is a false conflict that has been presented. All that has been established is that the courts of appeal have discretionary power to act where necessary, as discussed in *Singleton* and *Hormel.* Additional demonstrations of authority to consider a legal issue for the first time on an appeal, even though not presented by the parties, are found in *American Surety Co. of N.Y. v. Colblentz,* 381 F.2d 185 (5th Cir., 1967); *Empire Life Insurance Co. of America v. Valdak Corp.,* 468 F.2d 330, 334 (5th Cir., 1972); *Mercury Motor Express, Inc. v. Brinke,* 475 F.2d 1086, 1091 (5th Cir., 1973); *Ricard v. Birch,* 529 F.2d 214 (4th Cir., 1975); *Martinez v. Mathews,* 544 F.2d 1233, 1237 (5th Cir., 1976); and *French v. Estelle,* 696 F.2d 318, 319 (5th Cir., 1983). These citations are but a mere sampling of many that uniformly hold that the principle of not hearing issues being raised for the first time on appeal must be relaxed where the question is one of law and failure to hear it would result in a miscarriage of justice. There is a further distinction in the instant case in that the legal issue was not raised by either party on the appeal. The Court of Appeals took it up on its own motion. Judge Goldberg, in *Empire Life Insurance Co., Supra,* at p. 334, pointed out that the appeals court has to fulfill its duty to apply the correct law and get the case back on the right track, and not acquiesce in "the erroneous application of law indulged in by all parties below," and that "neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility."

Mercury Motor Express, Supra, at p. 1091, further cites as authority the recognized texts of 9 *Moore's Federal Practice,* para 110.25[1] (2d Ed. 1972), and 3 *Barron & Holzhoff, Federal Practice and Procedure,* sec. 1440 (Wright Ed. Supp. 1971). Chief Judge Haynesworth of the 4th Circuit, in *Ricard v. Birch, Supra,* at p. 216, quotes succinctly from *Washington Gas Light Co. v. Virginia Electric & Power Co.,* 438 F.2d 248, 250-251 (4th Cir., 1971):

> " . . . if deemed necessary to reach the correct result, an appellate court may *sua sponte* consider points not . . . even raised on appeal by any party."

Singleton clearly holds that the application and exercise of discretion must be measured and considered on a case by case basis. The issue raised by petitioner is not one of significance and importance to warrant a review of the exercise of discretion by the Court of Appeals. Based upon the facts of this case, petitioner is in error in seeking to invoke the jurisdiction of the United States Supreme Court in order to reconsider the application of Florida law to the factual issues in this case.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari because no conflict exists between the decision and opinion of the Eleventh Circuit herewith with rulings of other circuits. The Eleventh Circuit has relied upon a well founded line of decisions of this Court holding that it is a matter of discretion of the Court of Appeals whether it is to make a ruling upon an issue *sua sponte* not raised by the parties. The Eleventh Circuit has followed a long line of precedent from its parent circuit, the Fifth Circuit, holding that it must avoid a miscarriage of justice that could result from blinding their eyes from a clear error of law at the trial court level which affected a significant aspect of the case.

The decision below was correct. The fact that the Eleventh Circuit Court of Appeals rejected the argument presented in this Petition in the Petition for Rehearing submitted to the Eleventh Circuit (Appendix "D" and "E," Petitioner's Appendix, pp. A-33-43) clearly demonstrates that the issue was thoroughly considered below, and no abuse of discretion existed on the part of the Eleventh Circuit for acting *sua sponte*. The issue raised on this Petition affects few, other than the litigants herein, and is not important enough to warrant this Court granting certiorari and accepting the case for review. The Petition for Writ of Certiorari to the Eleventh Circuit should be denied. Res-

pondent should be permitted to return to the Trial Court to complete the trial of this action with the application of correct legal principles to the issues.

Respectfully submitted,

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Counsel for Respondent

December 28, 1987

APPENDIX

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 84-977-CIV-ORL-18

XANADU OF COCOA BEACH, INC.
a Florida corporation,
Plaintiff,

v.

MARVIN A ZETLEY,
Defendant/Third-Party Plaintiff,

v.

C & C DEVELOPMENT, INC.
a Florida corporation, and
KENNETH E. ALLES,
Third-Party Defendants

PRE-TRIAL STIPULATION

Pursuant to Rule 3.06(b) M.D. Fla. R., counsel for the parties have conferred on several occasions, both in person and by telephone, within the past ninety (90) days. As a result thereof, the parties have concluded that settlement is unlikely, and herewith submit the Pre-Trial Stipulation as required by Local Rule 3.06(b).

1. THE BASIS OF FEDERAL JURISDICTION.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. Sec. 1332, in that the plaintiff is a Florida corporation, the defendant/third-party plaintiff is a Wisconsin citizen, and the third-party defendants are Florida citizens and residents. The amount in controversy exceeds the sum of Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs.

2. STATEMENT OF THE NATURE OF THE ACTION.

Plaintiff has sued in two counts. The first is an action for ejectment of the defendant from a condominium unit (PH-2), owned by plaintiff, situate in Brevard County, Florida, and for damages for lost profits during the period of time defendant has wrongfully occupied said unit. The second count is an action for slander of title based on defendant having filed and recorded a Notice of Lis Pendens in this action without the proper basis in law or fact; said Notice of Lis Pendens was dismissed by the Court upon motion of plaintiff.

The defendant, ZETLEY, has answered with certain affirmative defenses, and has filed a Counterclaim with two counts seeking declaratory relief establishing and quieting title in his name, and for recovery of damages in the sum of Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars, being the alleged reasonable value of the property.

ZETLEY, as a third-party plaintiff, maintains an action against C & C DEVELOPMENT, INC., and KENNETH E. ALLES, seeking in several counts specific performances of a contract for delivery of title of record to the condominium unit in question; Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars damages, plus interest, based on a Note, in the event ZETLEY does not obtain title; and Seventy Five Thousand and no/100 ($75,000.00) Dollars additional damages pursuant to agreements with the third-party defendants.

Finally, the third-party defendant, C & C DEVELOPMENT, INC., has filed a Counterclaim in two counts. Count One is for damages for breach of contract and Count Two is for damages for fraud and misrepresentation relating to the same agreements. The agreements under which suit is brought by the third-party defendants are the same under which the defendant based his Third-Party Complaint.

3. GENERAL STATEMENT OF EACH PARTY'S CASE

A) Case of Plaintiff, XANADU OF COCOA BEACH, INC.

Plaintiff seeks ejectment of the defendant from a condominium unit it holds title to, situate in Brevard County, Florida. Plaintiff maintains that the defendant has no legal or equitable ownership interest nor possessory right to said unit. Plaintiff bases its assertions on the following grounds, which are disputed and denied by defendant:

(1) The contractual agreements under which defendant claims an ownership interest are not with the plaintiff, nor did the other contracting parties have authority, either express, implied, or apparent, to act on behalf of or as agents of plaintiff. Furthermore, the defendant knew the agreement was not with nor binding upon the plaintiff.

(2) Defendant has released plaintiff from any claim to said condominium unit or for an action for damages.

(3) The terms of the agreements under which defendant claims an ownership interest specifically provide a sole and exclusive remedy for damages, thereby barring any action to quiet title.

(4) Any action by defendant for quiet title to said condominium unit is barred by the statute of frauds.

(5) Plaintiff's action for slander of title is based upon defendant's wrongful filing and recording of a Notice of Lis Pendens without proper basis in law or fact.

B) Case of Defendant, MARVIN A. ZETLEY, With Respect to Claims of XANADU OF COCOA BEACH, INC.

ZETLEY has denied the propriety of plaintiff's claim of title, contending that it obtained the interest of co-joint venturer, which was the alter ego of third-party defendants, to the detriment and exclusion of ZETLEY'S claims of ownership interest through collusion in an effort to defraud ZETLEY. ZETLEY also relies on the defense of laches, stating he has been in open, continuous, and exclusive possession of the unit since October 18, 1983.

ZETLEY has counterclaimed seeking declaratory relief of quieting title, free of liens and unencumbered, in his name, and, in the alternative, for the recovery of compensatory damages of Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars being the claimed value of the condominium.

C) Case of Third-Party Plaintiff, MARVIN A. ZETLEY, Against Third-Party Defendants, C & C DEVELOPMENT, INC., and KENNETH E. ALLES.

ZETLEY sets forth three separate counts against C & C and ALLES. First, he demands specific performance of certain contractual agreements concerning the delivery of a deed, free and clear of all encumbrances, to him for the condominium unit in question. Second, in the alternative, he seeks compensatory damages, based on a Promissory Note for Three Hundred Fifty Thousand and no/100 ($350,000.00) Dollars in default of getting title to the condominium unit, together with interest at 20% per annum commencing on and after October 1, 1983. Finally, by reason of the failure of the third-party defendants to deliver title to the condominium to ZETLEY by October 31, 1983, and pursuant to additional writing executed by third-party defendants, ZETLEY seeks the recovery of Seventy Five Thousand and no/100 ($75,000.00) Dollars, being certain stipulated damages.

D) Case of Third-Party Defendants With Respect to ZETLEY.

Third-party defendant, C & C DEVELOPMENT, INC., has brought a Counterclaim against the defendant/third-party plaintiff based upon alleged fraudulent misrepresentations made by defendant relative to the sale of the Brown Deer Racquet Club located in Wisconsin to the third-party defendant under the agreements attached to the defendant's Third-Party Complaint. Third-party defendant, C & C DEVELOPMENT, INC., alleges that the factual representations made by the defendant/third-party plaintiff regarding the fair market value, financial condition, and present income produced by said racquet club were false and known to be false by the defendant/third-party plaintiff at the time they were made, thus providing the basis for the third-party defendant's action for breach of contract and fraud and misrepresentation.

ZETLEY denies any fraud or misrepresentation and denies third-party defendants suffered any damages whatsoever, and alleges that they actually resold the property almost immediately after its acquisition at a substantial profit.

4. LIST OF ALL EXHIBITS TO BE OFFERED AT TRIAL

A) Plaintiff's Exhibits.

(1) Copy of Warranty Deed from Sand Dunes Properties, Inc. to XANADU OF COCOA BEACH, INC. and Sunflower Club, Inc., d/b/a Xanadu Joint Venture.

(2) Copy of Warranty Deed from Xanadu Joint Venture, by Sunflower Club, Inc. and XANADU OF COCOA BEACH, INC., to XANADU OF COCOA BEACH, INC.

(3) Declaration of Condominium of Xanadu, a condominium, dated March 21, 1983.

(4) Copy of release dated September 21, 1983 from defendant to plaintiff.

(5) Certificate of Occupancy for Xanadu Condominium.

(6) Any documents listed by the defendant.

B) Defendant's Exhibits.

1) **Closing Statement.** ZETLEY - C & C 5/20/82 re: 9418 North Green Bay Road, Milwaukee, Wisconsin.

2) **Warranty Deed.** ZETLEY to C & C, 5/20/82 re: 9418 North Green Bay Road, Milwaukee.

3) **Wisconsin Real Estate Transfer Tax Return.** 5/20/82 re: 9418 North Green Bay Road, Milwaukee.

4) **Lease.** 5/20/82 - between C & C and Brown Deer Racquet Club (for restaurant and bar).

5) **Promissory Note.** 5/20/82, C & C to ZETLEY with guaranty by ALLES, for $500,000.00.

6) **Promissory Note.** 5/20/82, C & C to ZETLEY with guaranty by ALLES, for $150,000.00.

7) **Promissory Note.** 5/20/82, ALLES to ZETLEY for $150,000.00.

8) **Check No. 1396.** Brown Deer Racquet Club to C & C, 5/28/82, for $50,730.55.

9) **Ledger Sheet Calculation** of refunds in sum of $50,730.55 due C & C from ZETLEY.

10) **Memorandum Agreement** of 6/2/82 between ZETLEY, C & C, and ALLES.

11) **Letter 6/4/82** Mequon Racquet Club to ALLES.

12) **Letter 6/4/82** Attorney Thomas M. Kells to ZETLEY.

13) **Agreement of 11/11/82** between ZETLEY, Brown Deer Racquet Club, C & C, and ALLES relinquishing claim by ZETLEY to Xanadu Condominium Unit 505, and releasing ZETLEY and Brown Deer Racquet Club from lease of 5/20/82.

14) **Obligation 1/1/83** for $20,000.00 from C & C and ALLES to ZETLEY.

15) **Owner's Affidavit** by Scott Alles for Xanadu Joint Venture, 5/13/83, for Xanadu Condominium Unit 1204.

16) **Agreement of 6/30/83,** C & C and ALLES to ZETLEY for $75,000.00 liability.

17) **Closing Statement 8/20/83,** Trade of 9418 North Green Bay Road, Milwaukee (Mequon Racquet Club) ALLES-Huber-Carr.

18) **Preliminary Title Commitment No. 10-0227-10-001620,** 9/1/83, for Xanadu Condominium Unit 1204, Chicago Title Insurance Company.

19) **Closing Statement 5/13/83** re: Xanadu Condominium Unit 1204 transferred to O'Keefe Centre Ltd.

20) **Mutual General Release 10/6/83** between ZETLEY, C & C, and ALLES.

21) **Promissory Note 10/1/83** $350,000.00 C & C and ALLES to ZETLEY.

22) **Letter, ZETLEY to C & C and ALLES 2/17/84** demanding title evidence for Xanadu Penthouse Unit 2.

23) **Letter, ZETLEY to C & C 4/28/84** demanding closing and title to Xanadu Penthouse Unit 2.

24) **Letter, ZETLEY to C & C and ALLES 7/19/84** demanding damages.

25) **Memorandum** Alan Dolenshek to ALLES concerning resale of Brown Deer Racquet Club to George Eisen, et al.

26) **Letter of Intent, 5/10/82,** Mequon Racquet Club, a Wisconsin limited partnership, to ALLES, concerning purchase of 9418 North Green Bay Road, Milwaukee.

27) **Amendment of Letter of Intent, 5/12/82,** Mequon Racquet Club to Alles.

28) **Land Contract,** C & C to Mequon Racquet Club, 5/21/82, re: 9418 North Green Bay Road, Milwaukee.

29) **Quit Claim Deed 4/28/84,** Xanadu Joint Venture to XANADU OF COCOA BEACH, INC., covering Xanadu condominium unit Ph-2, and other parcels.

30) **Letter of Transmittal 8/19/83,** Mequon Racquet Club to C & C tendering Quit Claim Deed.

31) **Quit Claim Deed 8/21/83,** Mequon Racquet Club to C & C re: 9418 North Green Bay Road, Milwaukee.

32) **Wisconsin Real Estate Transfer Tax Return 9/5/83,** Mequon Racquet Club to C & C re: 9418 North Green Bay Road, Milwaukee.

33) **Letter of Transmittal 9/5/83,** Mequon Racquet Club to C & C.

34) **Letter 8/22/83** Mequon Racquet Club to C & C.

35) **Letter Agreement** Towne Realty, Inc. to ZETLEY dated 9/21/83, signed by ZETLEY on 10/10/83.

36) **Letter, Attorney Charles F. Schalmo** (for C & C) to ZETLEY, 10/12/83.

37) **Xanadu Joint Venture Agreement** 10/31/80 between XANADU OF COCOA BEACH, INC. and Sunflower Club, Inc.

38) **Amendment to Xanadu Joint Venture Agreement** dated 12/15/81.

39) **Termination of Xanadu Joint Venture with handwritten addenum** dated 4/18/84.

40) **Memorandum** Arthur W. Wigchers to Joseph J. Zilber, et al dated 2/18/83.

41) **Letter** Charles F. Schalmo to Towne Realty, Inc. dated 8/1/83.

42) **Warranty Deed, Xanadu Joint Venture to O'Keefe Centre, Ltd.** re: Xanadu condominium unit 1204, dated 5/13/83.

43) **Memorandum,** Zilber to Wigchers dated 7/28/83.

44) **Promissory Note 9/30/81,** Unicare Health Facilities, Inc. to MARVIN A. ZETLEY $100,000.00.

45) **Assignment of Note of 9/30/81** ZETLEY to C & C and ALLES dated 7/29/83.

46) **Assignment of Note 9/30/81** C & C and ALLES to Towne Realty, Inc. dated 10/10/83.

47) **Memorandum** Wigchers to James Young dated 9/21/83.

48) **Memorandum** dated 10/5/83, Wigchers to Zilber, et al.

49) **Memorandum** dated 3/29/84, Wigchers to Zilber, et al.

50) **Quit Claim Deed, Xanadu Joint Venture to Schill,** 4/18/84, Xanadu condominium unit 306.

51) **Quit Claim Deed, Xanadu Joint Venture to Sunflower Club, Inc.,** 4/18/84, Xanadu condominium unit 503.

52) **Memorandum,** James B. Young to Arthur Wigchers dated 6/8/84.

53) **Xanadu Sales Report 10/31/82.**

54) **Xanadu Sales Report 1/31/83.**

55) **Xanadu Sales Report 5/21/83.**

56) **Xanadu Sales Report 5/24/83.**

57) **Memorandum** from Arthur Wigchers 5/25/83.

58) **Memorandum** undated written Memorandum (Deposition Exhibit 65.)

59) **Memorandum** undated written Memorandum. (Deposition Exhibit 66.)

60) **Xanadu Sales Report** 6/23/83.

61) **Memorandum,** Rudy Rutkowski to Wigchers 8/10/83.

62) **Memorandum** Rutkowski to Wigchers 2/27/84.

63) **Xanadu Income Projection Memorandum** dated 3/28/84. (Deposition Exhibit 70.)

64) **Xanadu Income Projection Memorandum** dated 3/28/84. (Deposition Exhibit 71.)

65) **Memorandum** Wigchers to Zilber, et al dated 4/3/84.

66) **Memorandum** Wigchers to Zilber, et al dated 9/13/84.

67) **Warranty Deed** to Brown Deer Racquet Club property from C & C DEVELOPMENT, INC. to John D. Huber dated August 22, 1983.

68) Defendant, MARVIN A. ZETLEY, reserves the right to offer additional exhibits at time of trial which may become relevant.

C) **Third-Party Defendant's List of Exhibits.**

(1) Copy of pro forma statement of earnings received from defendant prior to sale of the Brown Deer Racquet Club.

(2) Copy of Contract of Sale and Purchase of Brown Deer Racquet Club entered into between defendant and third-party defendant, C & C.

(3) Copies of any and all Federal Income Tax Returns filed by MARVIN A. ZETLEY and/or Brown Deer Racquet Club during the calendar years that ZETLEY operated the Brown Deer Racquet Club per Request to Produce.

(4) All documents listed by third-party plaintiff.

All parties reserve the right to object to materiality and relevancy of all exhibits, and to further object to same on basis of hearsay. Plaintiff objects to authenticity of defendant's Exhibits 8 and 9.

5. LIST OF ALL WITNESSES WHO MAY BE CALLED AT TRIAL

A) **Plaintiff's List of Witnesses.**

(1) KENNETH E. ALLES.

(2) James B. Young.

(3) Defendant, MARVIN A. ZETLEY.

(4) All witnesses listed by defendant.

B) Defendant, ZETLEY'S List of Witnesses.

1) MARVIN A. ZETLEY

2) KENNETH E. ALLES, adversely

3) Arthur B. Wigchers, Jr., adversely

4) James B. Young, adversely

5) Joseph J. Zilber, adversely

6) Alan Dolenshek

7) Marilyn Zetley

8) George Eisen

9) Arnold Matayas

10) Gerald Stein, adversely

11) Defendant, ZETLEY, reserves the right to call any and all of the witnesses of plaintiff and/or third-party defendants as adverse witnesses.

C) Third-Party Defendants

(1) KENNETH E. ALLES.

(2) George Eisen.

(3) Defendant/third-party plaintiff, MARVIN A. ZETLEY.

(4) All witnesses listed by third-party plaintiff.

6. DEPOSITIONS

(1) KENNETH E. ALLES, dated May 30, 1985, in its entirety.

(2) James B. Young, dated July 24, 1985, in its entirety.

(3) Arthur Wigchers, Jr., dated July 24, 1985, in its entirety.

(4) Joseph J. Zilber, dated July 25, 1985, in its entirety.

(5) MARVIN A. ZETLEY, dated May 30, 1985, in its entirety.

7. STATEMENT OF ADMITTED FACTS WHICH WILL REQUIRE NO PROOF AT TRIAL.

1) Plaintiff is presently the record title owner of condominium unit Ph-2, Xanadu Condominium, Cocoa Beach, Florida.

2) Defendant did file and record a Notice of Lis Pendens against said condominium unit on December 11, 1984.

3) During the early part of October 1983, ZETLEY was given a key to the Penthouse Unit, and began the decorating and furnishing of the Unit. It was completed, and ZETLEY physically moved in with his family prior to Christmas in 1983, and he has retained possession and occupancy since that time.

4) One or more of the members of the Joint Venture, and/or its officers, employees, or agents have had knowledge of the physical occupancy of the premises in question by ZETLEY since October 1983.

5) MARVIN A. ZETLEY, defendant, is a citizen and resident of the metropolitan area of Milwaukee, Wisconsin, and is an investor engaged in nursing home, pharmaceutical, and real estate businesses.

6) Prior to May 20, 1982, ZETLEY was the owner of a parcel of real estate at 9418 North Green Bay Road, Milwaukee,

Wisconsin, consisting of indoor and outdoor tennis facilities, outdoor swimming pool, and clubhouse with bar, restaurant, and locker room facilities, which was known as Brown Deer Racquet Club.

7) On May 20, 1982, ZETLEY entered into a trade transaction with KENNETH E. ALLES, one of the third-party defendants, individually, and as a principal officer of the C & C DEVELOPMENT, INC., the other third-party defendant, both of whom were Florida residents and citizens, for the exchange of ZETLEY'S equity in 9418 North Green Bay Road, Milwaukee, for condominium Units 505, 1204, and Penthouse Unit 2 (also referred to as "H" in Xanadu, which was a condominium then under construction in Cocoa Beach, Florida.

8) Simultaneous with the closing of May 20, 1982, Brown Deer Racquet Club, Inc., a Wisconsin corporation signed a lease for the restaurant and bar portion of the premises with ZETLEY guaranteeing the lease. The lease was to terminate on April 30, 1984.

9) On the same date, ALLES, in behalf of C & C, entered into a written Land Contract (similar to a Florida contract for Sale) with Mequon Racquet Club, a Wisconsin limited partnership, subject to the lease with Brown D[illegible]r Racquet Club, Inc. The price stated in the Land Contract was One Million, Two Hundred Sixty Seven Thousand, Two Hundred and no/100 ($1,267,200.00) Dollars.

10) On October 31, 1980, a Joint Venture Agreement was entered into between XANADU OF COCOA BEACH, INC., a Florida corporation, which was, and is, a wholly owned subsidiary of Towne Realty, Inc., a Wisconsin corporation, and Sunflower Club, Inc., a Florida corporation, which contained a Guaranty executed by KENNETH E. ALLES, individually. The Joint Venture Agreement was intended to cover the development of the Xanadu Condominium; an Amendment to

the Joint Venture Agreement was executed December 15, 1981 by Towne Realty, Inc. (the parent corporation of XANADU OF COCOA BEACH, INC.), ALLES, individually, as guarantor, and as an officer of Sunflower Club, Inc., and by Joseph J. Zilber, as Chairman of the Board of XANADU OF COCOA BEACH, INC.

11) The Xanadu condominium was completed in the Spring of 1983, and Certificates of Occupancy were issued for the units in question.

12) Defendant executed the document which is identified previously as plaintiff's Exhibit 4 and Defendants Exhibit 35.

13) Repeated demands were made, unsuccessfully, by ZETLEY upon C & C and ALLES, in early 1984, for delivery of title to The Penthouse Unit.

8. CONCISE STATEMENT OF APPLICABLE PRINCIPLES OF LAW ON WHICH THERE IS AGREEMENT.

1) Federal Rules of Civil Procedure

2) Federal Rules of Evidence

3) Florida Statutes

4) Florida Substantive law as relates to plaintiff's Complaint.

5) Wisconsin Statutes

6) Wisconsin Substantive law as relates to Counterclaim of third-party defendants.

9. CONCISE STATEMENT OF ISSUES OF FACT WHICH REMAIN TO BE LITIGATED.

1) Whether plaintiff had knowledge of defendant's alleged interest in the subject condominium unit.

2) Is there a factual basis to warrant findings and conclusion of law applying the equitable doctrine of laches against the plaintiff, as relates to the continuous physical possession and occupancy of Penthouse Unit 2 by ZETLEY from early October, 1983, until service of a Summons and Complaint on ZETLEY on November 23, 1984?

3) Whether the Quit Claim Deed from the Xanadu Joint Venture to plaintiff corporation was executed to circumvent any legal or equitable interest the defendant alleges to possess regarding said condominium unit.

4) Determination of purpose, meaning, and intent of the execution of the Letter Agreement prepared by Towne Realty, Inc., and executed by ZETLEY on October 10, 1983, namely, was it a complete release of all claims ZETLEY had of any nature against Towne, XANADU OF COCOA BEACH, INC., and their officers, employees, etc., ~~or~~, only as relates to condominium Unit 1204, for which a deed was being delivered to ZETLEY'S nominee, O'Keefe Centre, Ltd.

5) Whether defendant possesses any legal or equitable ownership interest or possessory rights in said condominium unit which would be enforceable as to the plaintiff.

6) Whether plaintiff's title to condominium unit was slandered by virtue of defendant having filed and recorded a Notice of Lis Pendens on December 11, 1984, and what damages plaintiff suffered thereby.

7) Did ZETLEY misrepresent any material facts or defraud C & C and ALLES with respect to the original transaction on the Milwaukee real estate at 9418 North Green Bay Road.

8) What damages, if any, has C & C and/or ALLES suffered that ZETLEY should be liable for, as relates to the alleged misrepresentation and fraudulent conduct on the part of ZETLEY?

9) What damages is ZETLEY entitled to from XANADU OF COCOA BEACH, INC. if he does not receive title to Penthouse Unit 2?

10) What damages are due ZETLEY from C & C and ALLES?

11) Was Towne Realty, Inc. an alter ego of XANADU OF COCOA BEACH, INC.?

12) Whether KENNETH E. ALLES was at any time material to defendant's claim for relief an employee, servant, officer, director, shareholder, or agent of plaintiff, or whether he possessed any authority, either express, implied, or apparent, to action on behalf of or as an agent of the plaintiff.

13) If plaintiff prevails on its claim of ejectment, what damages is it entitled to recover from defendant, MARVIN A. ZETLEY.

10. CONCISE STATEMENT OF THOSE ISSUES OF LAW WHICH REMAIN FOR DETERMINATION BY THE COURT.

1) Applicability of equitable doctrine of laches to bar any defenses of plaintiff, XANADU OF COCOA BEACH, INC., against the Counterclaim of ZETLEY, thereby requiring delivery of unencumbered title to Penthouse Unit 2 in Xanadu Condominium to ZETLEY.

2) Whether defendant's claims are barred by reason of execution of document identified herein as plaintiff's Exhibit 4 - defendant's Exhibit 35.

3) Application of basic contract law relating to construction of ambiguities in contract documents against the person who drafted the document.

4) Applicability of Florida Statutes and Florida Substantive law entitling plaintiff to seek recovery of reasonable attorney's fees from ZETLEY.

5) Whether the agreements referred to in defendant's Answer and Counterclaim provide for an exclusive remedy of damages precluding an action for quiet title.

6) Whether the agreements referred to in third-party plaintiff's Complaint provide for an exclusive remedy of damages precluding an action for specific performance.

7) Whether specific performance relief is barred because the third-party defendants never possessed legal title to the subject condominium unit and therefore it is legally impossible to order third-party defendants to convey said condominium unit.

8) Whether third-party plaintiff is guilty of unclean hands and whether any equitable relief should therefore be denied.

9) Whether third-party defendant is entitled to a set-off in the event the third-party plaintiff prevails on its damages claim.

10) Is ZETLEY'S Counterclaim against XANADU OF COCOA BEACH, INC. barred by the Statute of Frauds?

11. APPLICATION OF FEDERAL RULES OF EVIDENCE AND CIVIL PROCEDURE

Counsel is unaware of any disagreement as to the application of the Federal Rules of Evidence or Civil Procedure.

12. LIST OF ALL MOTIONS OR OTHER MATTERS WHICH REQUIRE ACTION BY THE COURT.

1) Plaintiff filed a Motion for Summary Judgment to obtain Judgment on its Complaint, and to obtain dismissal of defendant's Counterclaim. Responsive pleadings in opposition, and a brief in opposition were submitted on August 22, 1985, to the Court by defendant's counsel. No decision has been rendered yet.

2) A Motion for a Protective Order was filed by counsel for defendant, ZETLEY, on November 5, 1985, seeking to quash and prohibit plaintiff's Request for Production of Documents directed to defendant, seeking the production of Federal Income Tax Returns filed by ZETLEY and/or Brown Deer Racquet Club, Inc. during the calendar years that ZETLEY operated the Brown Deer Racquet Club, issued by plaintiff's counsel on October 30, 1985, and received by defendant's counsel on November 4, 1985, in the U.S. Mail.

Respectfully submitted,

Dated at Cocoa Beach, Florida this 10th day of November, 1985.

/s/BRUCE W. JACOBUS
Attorneys for Plaintiff,
Xanadu of Cocoa Beach, Inc.

Dated at Milwaukee, Wisconsin this 13th day of November, 1985.

/s/IRVING D. GAINES
Attorney for Defendant,
Marvin A. Zetley

Dated at Cocoa Beach, Florida this 14th day of November, 1985.

/s/BRUCE W. JACOBUS
Attorneys for Third-Party
Defendants,
C & C Development, Inc., and
Kenneth C. Alles